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No. 72-1216

In the Supreme Court of the United States

OCTOBER TERM, 1972

CHARLES BAKER, et al.,

Petitioners,

vs.

F & F INVESTMENT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	7
I. The Court Of Appeals Improperly Restricted This Court's Decision In *Branzburg* v. *Hayes*	8
II. This Court Should Decide Whether *Branzburg* Is To Be Limited To Criminal Cases	9
III. The Court Of Appeals Improperly Permitted The Journalist To Conceal Information Crucial To Petitioners' Case	10
Conclusion	12

INDEX TO APPENDICES

Appendix A—Opinion of United States Court of Appeals for the Second Circuit ....App. 1

Appendix B—Opinion of United States District Court for the Southern District of New York .....App. 14

PAGE

Appendix C—Judgment Order of United States Court of Appeals for the Second Circuit ..... App. 21

Appendix D—Plaintiffs' Complaint ..... App. 22

Appendix E—Opinion of United States District Court for the Northern District of Illinois ..... App. 46

Appendix F—"Confessions of a Blockbuster" Article ..... App. 56

TABLE OF CASES

Branzburg v. *Hayes*, 408 U.S. 665 (1972) 2, 6-9, 11

Cervantes v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3389 (January 15, 1973) 11

Contract Buyers League, et al. v. *F & F Investment, et al.*, 300 F.Supp. 210 (N.D.Ill. 1969), *aff'd*, 420 F. 2d 1191 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970) 3, 4, 10

Contract Buyers League, et al. v. *F & F Investment, et al.*, 48 F.R.D. 7 (N.D. Ill. 1969) 3

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Petitioners, a class of Negro home purchasers, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 470 F.2d 778. The opinion of the United States District Court for the Southern District of New York is reported at 339 F. Supp. 942. These opinions are printed as Appendices A (App. 1) and B (App. 14), respectively, to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 7, 1972, and is printed as Appendix C to this Petition (App. 21). This Petition was filed within 90 days of that date. This Court has jurisdiction under 62 Stat. 928, 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does the Second Circuit decision violate principles announced by this Court in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), or otherwise improperly establish a federal constitutional testimonial privilege, by holding that the First Amendment protects a journalist from identifying a source who by his own admission violated the federal civil rights of petitioners?

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

STATEMENT OF THE CASE

This Petition seeks review of a decision of the United States Court of Appeals for the Second Circuit, affirming a District Court order, which held that this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), does not apply to the civil rights action brought by petitioners. Petitioners had requested the District Court for the Southern District of New York, and the Second Circuit on appeal, to

compel a journalist to identify a source who admittedly violated petitioner's federal civil rights. Both courts refused to require the journalist to divulge his source.

Petitioners are a class of approximately 3000 Negroes who purchased homes in Chicago, Illinois during the period 1952-1969. They are prosecuting this action under the Thirteenth and Fourteenth Amendments to the United States Constitution, and under the Civil Rights Acts (42 U.S.C. §§1982, 1983 and 1985(3)) against some 60 named defendants, all of whom were involved in the sale of homes to petitioners. Petitioners' complaint, as amended, is reproduced in pertinent part as Appendix D to this Petition (App. 22). The legal basis for the complaint is reviewed fully in the opinion of Judge Hubert L. Will, denying defendants' motions to dismiss, reproduced in pertinent part as Appendix E to this Petition (App. 46). (300 F. Supp. 210, N.D. Ill. 1969).*

Petitioners in their complaint allege in part that defendants sold homes to petitioners at excessive prices by encouraging and taking advantage of *de facto* residential segregation in Chicago. Petitioners allege that defendants engaged in "blockbusting" and a conspiracy to induce "panic selling" among prior white owners of the properties, allowing defendants to purchase those homes at drastically deflated prices. Defendants then sold those homes at grossly inflated prices to the Negro plaintiffs, on installment sales contracts, containing one-sided and oner-

* Judge Will's opinion holding this to be a proper class action is reported at 48 F.R.D. 7 (N.D. Ill. 1969). The interlocutory opinion of the Court of Appeals for the Seventh Circuit, regarding the statute of limitations, is reported at 420 F.2d 1191 (7th Cir. 1970), *cert denied*, 400 U.S. 821 (1970).

ous terms, which defendants were able to exact because of the severe shortage of housing in Chicago for Negroes brought about by racial segregation.

As summarized by Judge Will, a central allegation of the complaint is:

> ". . . that some of the defendants engaged in what is popularly known as 'blockbusting', that some of the defendants stimulated and preyed on racial bigotry and fear by initiating and encouraging rumors that negroes were about to move into a given area, that all non-negroes would leave, and that the market values of properties would descend to 'panic prices' with residence in the area becoming undesirable and unsafe for non-negroes." 300 F. Supp. 210, 214 (N.D. Ill. 1969) (App. 49).

Each of the defendants in his verified answer denied any participation in or knowledge of "blockbusting". The principal defendants, whose depositions were taken, likewise pleaded ignorance. One defendant, who unsuccessfully sought Fifth Amendment protection against all discovery, also denied any knowledge of "blockbusting."

For a period of more than three years, involving thousands of hours of discovery, petitioners examined documents in defendants' files and title records in Cook County, regarding the thousands of purchase and sale transactions at issue. The identity of the defendants was in most instances unavailable to petitioners, where property was held by financial institutions in the name of "blind" numbered land trusts permitted under Illinois law. (See, *e.g.*, App. 25-26.) Even where title records did reveal the name of a defendant as the true owner of such property, those records did not purport to record whether or not he purchased or sold the property by "blockbusting" or "panic peddling" tactics.

In the course of discovery, petitioners' counsel learned of a magazine article which appeared in the *Saturday Evening Post* on July 14, 1962, entitled "Confessions of a Blockbuster: A Chicago real-estate agent who moves Negro families into all-white blocks reveals how he reaps enormous profit from racial prejudice." The text of this article is reproduced as Appendix F to this Petition (App. 56). The article was written by "Norris Vitchek" as told to Alfred Balk. "Norris Vitchek" admitted to "blockbusting" and "panic peddling". He admitted fostering racial hatred, which enabled him to purchase homes from whites at depressed prices and sell to Negroes at inflated prices. In short, he admitted the truth of each and every allegation of petitioners' complaint.

The "Vitchek" "Confessions", coming as they did from one of Chicago's largest blockbusters in the relevant period, and admitting in every respect the civil rights violations petitioners had alleged, directly contradicted the verified denials which the defendants had previously made. Petitioners therefore took the deposition of the journalist, Alfred Balk, to learn which blockbuster had made these admissions of liability.*

At his deposition, Mr. Balk confirmed that "Norris Vitchek", was a single, real person who made to Mr. Balk all of the comments attributed to him in the "Confessions". Mr. Balk did not, however, provide any additional detail regarding any of the real estate transactions, house locations or incidents of blockbusting which were described only generally in the "Confessions". Finally, Mr. Balk

*Because Mr. Balk had subsequently moved to New York City, his deposition was taken in New York pursuant to Rule 30 of the Federal Rules of Civil Procedure.

refused to answer any questions relating to the identity of "Norris Vitchek", on the basis of "the First Amendment . . . which [protects] not only the right to disseminate, but the right to gather information."

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, petitioners moved in the Southern District of New York for an order compelling Mr. Balk to identify "Norris Vitchek." That court, *per* Hon. Dudly Bonsal, denied petitioners' motion concluding that, although "[a] reporter does not have an absolute right under the First Amendment not to disclose his source," there is nevertheless a First Amendment protection which outweighs petitioners' need in this case to know the name of the source. (App. 19-20.)

The Second Circuit affirmed the judgment of the District Court, holding that this Court's decision in *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), declining to establish a First Amendment privilege for newsmen to withhold their sources from grand juries, did not apply to petitioners' case. Although the disclosure of "Vitchek" as a party defendant, in and of itself, would have imposed liability upon him, the Second Circuit said that his identity did not "go to the heart" of petitioners' case. (App. 10.) Despite the years of exhaustive discovery and defendants' sworn denials of "blockbusting", both lower courts said there were "other sources" by which petitioners could learn "Vitchek's" identity. (App. 10.) Despite the sweeping issues and thousands of plaintiffs involved in petitioners' federal civil rights claim, the Second Circuit found no "compelling concern" which here overrides the asserted free press "right to gather information." (App. 13.)

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision in this case seriously undermines this Court's reaffirmation, in *Branzburg* v. *Hayes,* of established principles regarding the First Amendment and testimonial privilege. By severely limiting this Court's decision in *Branzburg,* the court below has created much confusion and uncertainty as to the existence and extent of a so-called "newspaperman's privilege." At the same time, it has severely hampered petitioners' pursuit of their civil rights claims.

This Court flatly held in *Branzburg* that the First Amendment does not create a federal privilege for journalists to refuse to disclose their sources. While *Branzburg* arose in the factual context of criminal grand jury proceedings, there is nothing in *Branzburg* to justify the Second Circuit's conclusion that the *Branzburg* principles do not apply here because petitioners' case is civil.

Petitioners have a compelling need for the identity of the source in this case. It should not matter that petitioners' claim arises in the civil, rather than criminal, context. Petitioners sue as a class of thousands, seeking vindication of their civil rights. Identification of the journalists' source would, by his own admission, establish his full and complete liability for the wrongful injury which he concededly inflicted on petitioners.

The decision of the Second Circuit, if left standing, will in effect create an absolute journalist's privilege in civil cases. The existence of a privilege in civil cases is presently the subject of a widespread national debate in the press, lower court decisions, legal journals, and in Congress itself. This Court should now consider this important question by reviewing the judgment of the Second Circuit in this case.

I.

The Court Of Appeals Improperly Restricted This Court's Decision In Branzburg v. Hayes.

The Second Circuit narrowly interpreted this Court's decision in *Branzburg* to apply solely to criminal grand jury proceedings. The court described *Branzburg* as establishing a "limited principle" and holding "only that newsmen could be required to disclose confidential sources to a grand jury conducting a criminal investigation." (App. 2-3.) Posed in such a light, the Second Circuit refused to apply the *Branzburg* rationale to this case.

Yet, *Branzburg* contains no statement that it will not apply to civil cases. The refusal to recognize a privilege in criminal cases would not, in ordinary logic, imply that a privilege *does* exist in civil cases. This Court concluded in *Branzburg:*

> "Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do." 408 U.S. at 689-90.

This Court noted, however, that although the United States Constitution did not confer a newspaperman's privilege, the Congress is free to create one by statute if it determines such a privilege to be appropriate. (408 U.S. at 706). The Court of Appeals for the Second Circuit has now taken upon itself the very legislative function which this Court in *Branzburg* refused to exercise, and has established in civil cases the First Amendment privilege which this Court in *Branzburg* declined to create.

If the decision of the Court of Appeals in this case stands unreviewed, the *Branzburg* holding that there is no constitutional privilege, and the *Branzburg* conclusion that the creation of testimonial privileges ought properly to be left to Congress, will both be seriously eroded.

II.

This Court Should Decide Whether Branzburg Is To Be Limited To Criminal Cases.

The Court of Appeals' decision in this case avoids being directly contrary to *Branzburg* only because *Branzburg* arose in the factual context of questions put to a journalist by a grand jury, whereas the present case involves a federal civil action.

Although nothing in the *Branzburg* opinion indicates that this Court intended it solely as a "grand jury rule" or a "criminal cases rule"—let alone intended it to establish a First Amendment privilege for journalists in civil cases—it is true that the particular facts of *Branzburg* have left a penumbra of uncertainty around that decision. That the Court of Appeals below could have reached the decision it did in this case, so shortly after *Branzburg,* is but one indication of the door left open to further dispute.

Because it is arguable that *Branzburg* did not resolve the existence of a journalist's First Amendment privilege in civil cases—an argument adopted and answered in the affirmative by the Court of Appeals here—litigants, journalists and judges are presently without workable guidelines in this increasingly-important area of the law. Because an issue is raised of such widespread importance, and because the existence of a First Amendment journalists' privilege in civil cases will remain a source of disruption until resolved by this Court, the opinion and judgment of the Court of Appeals should be reviewed.

III.

The Court Of Appeals Improperly Permitted The Journalist To Conceal Information Crucial To Petitioners' Case.

In determining whether to require disclosure of the source of the "Confessions" story, the Second Circuit engaged in a weighing process, comparing the "public policy" involved in state journalist privilege statutes with the need to compel testimony in judicial proceedings. (App. 5-10.) The court concluded that the identity of the source here was not sufficiently important to petitioners' case, stating that petitioners had sources available to them other than the journalist, and that "Vitchek's" identity did not "go to the heart" of petitioners' claim. (App. 10.)

These two findings are extraordinary in light of the history of this case. Petitioners had undertaken three years of active discovery and had uncovered no direct "blockbusting" information. Judge Bonsal suggested that petitioners inspect County title records (App. 20). Not only did petitioners undertake an exhaustive title search in connection with discovery of "land trusts," but such a search would be fruitless as a means of obtaining direct evidence of "blockbusting." Nearly all the properties are held in "blind" land trusts which do not reveal the true owner of the property. In fact, Judge Will refused to dismiss the nominee banks named in land trusts as parties defendant because "the buyers [petitioners] have no way to identify the real parties." (300 F.Supp. at 229) (App. 54). Petitioners have identified 60 some sellers of properties to Negroes and named them as defendants because of the excessive profits realized, but this does not isolate the phenomenon of "blockbusting".

It is difficult to imagine information more crucial to petitioners' case than the identity of "Vitchek". "Vitchek"

admitted (1) approaching white homeowners living near Negro neighborhoods; (2) instilling a fear that Negroes would move into their blocks with a consequent deterioration in neighborhood property values; (3) buying those properties at a depressed value created by fear; and (4) selling the properties to Negroes at inflated prices, usually financing the transactions by means of the land contract device. He would then use the proceeds of his most recent sales as a financial base for further "panic peddling" in the neighborhood. He thereby reaped profits from the process of "buy white low—sell Negro high". He admitted that once a neighborhood began 'changing" racially, homes in that neighborhood would not be shown to whites. "Vitchek's" admissions constitute a confession that crucial allegations in petitioners' complaint are true. Liability as to each petitioner who dealt with "Vitchek" could undoubtedly be established by the revelation of his identity.

Petitioners seek from the journalist only the name of the source, which will permit them to bring home the out-of-court admissions to the appropriate defendant. This is thus *not* a case where petitioners seek a "fishing expedition" for useful "leads"; it is *not* a case where the information is of doubtful relevance to the proceeding.* It is *not* a case where the information is hearsay, requiring further verification. Finally, this is *not* a case where the information sought is so extensive or burdensome that it constitutes harassment of the journalist. The request for disclosure by petitioners here is in many respects far more compelling than that presented in *Branzburg;* it is also a far more narrow and limited request.

The "compelling interest" requiring disclosure here is inherent in the nature of petitioners' civil rights complaint.

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*Contrast, *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3389 (January 15, 1973).

They complain of flagrant discrimination and have sough recourse under the federal civil rights acts. The informa tion which will establish clear and unmistakable violation of their rights is available to them if the journalist is re quired to testify. This Court has held that there is no fed eral or constitutional journalist privilege protecting th source. The overriding federal policy behind the effectiv guarantee of civil rights far outweighs any state or othe recognized interest reflected in a so-called "newspaperman' privilege".

CONCLUSION

For the reasons set forth above, a writ of certiorar should issue to review the judgment and opinion of th United States Court of Appeals for the Second Circuit i this case.

Respectfully submitted,

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INDEX TO APPENDICES

PAGE

Appendix A—Opinion of United States Court of Appeals for the Second Circuit ..... App. 1

Appendix B—Opinion of United States District Court for the Southern District of New York ..... App. 14

Appendix C—Judgment Order of United States Court of Appeals for the Second Circuit ..... App. 21

Appendix D—Plaintiffs' Complaint ..... App. 22

Appendix E—Opinion of United States District Court for the Northern District of Illinois ..... App. 46

Appendix F—"Confessions of a Blockbuster" Article ..... App. 56

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

September Term, 1972
Decided December 7, 1972

Docket No. 72-1413

CHARLES BAKER, ET AL.,

APPELLANTS,

V.

F & F INVESTMENT, ET AL.,

APPELLEES.

Before: SMITH, KAUFMAN and MULLIGAN, *Circuit Judges.*

Appeal from an order entered in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge,* denying a motion pursuant to Rule 37, F.R.Civ.P, to compel disclosure of a journalist's confidential news sources.

Affirmed.

KAUFMAN, *Circuit Judge*:

This unusual interlocutory appeal involves the validity of a district judge's decision refusing to compel a journalist to disclose confidential news sources. Appellants here are plaintiffs in a federal class action pending in the Northern District of Illinois,[1] a case which involves alleged racial discrimination in the sale of houses to Negroes in Chicago. Appellants moved in the Southern District of New York

[1] *Baker, et al.* v. *F & F Investment, et al.*, 69 C 15 (N.D.Ill.).

for an order under Rule 37, F.R.Civ.P.,[2] to compel Alfred Balk, a journalist, to answer questions posed to him during the taking of his oral deposition in New York City. Judge Bonsal denied the motion. Appellants urge us to extend to this civil case the limited principle of *Branzburg* v. *Hayes (United States* v. *Caldwell)*, 408 U.S. 655 (1972), which held only that newsmen could be required to disclose confidential sources to a grand jury conducting a criminal

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[2] Rule 37, Failure to Make Discovery: Sanctions, provides, in pertinent part:

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34 fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

investigation. We decline that invitation and affirm the order below.[3]

I.

The underlying case is a civil rights class action brought in behalf of all Negroes in the City of Chicago who purchased homes from approximately 60 named defendants be-

[3] Although neither party has questioned the appealability of this order, it is appropriate that we state that ordinarily, orders denying or directing discovery are non-appealable interlocutory decisions, *see, e.g. Alexander* v. *United States*, 201 U.S. 117 (1906); *Borden Co.* v. *Sylk*, 410 F.2d 843 (3d Cir. 1969); *United States* v. *Fried*, 386 F.2d 691 (2d Cir. 1967); *cf., Republic Gear Company* v. *Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967). Special circumstances, however, attend motions for discovery made in a district other than the district in which the main action is brought. Although an order compelling disclosure in an "outside" jurisdiction is generally not reviewable, *see, e.g., National Nut Co. of California* v. *Kelling Nut Co.*, 134 F.2d 532 (7 Cir. 1943); *cf., Honig* v. *E. I. duPont deNemours & Co.*, 404 F.2d 410 (5 Cir. 1968), an order denying disclosure in a jurisdiction beyond that of the main proceeding is immediately reviewable, to give the party seeking discovery an effective remedy. *Republic Gear Company* v. *Borg-Warner Corp., supra*, at 554. In that case Judge Waterman stated the underlying policy justification for this rule as follows:

> [E]ven if the appellate court in the jurisdiction in which discovery is sought awaited a final decision in the main proceeding before acting at all it would be necessary to return to the ancillary appellate court to argue the discovery issue. And if, upon appeal, the party were successful in reversing the lower court's order and thus obtained discovery, he would be required to go back to the court where the main case had already been tried, and there, with the discovered evidence now admissible on the merits, move to retry the case. The impracticality of this cumbersome procedure compels us to grant immediate appellate review of an order which, in another context, we might properly hold to have been an interlocutory order.

Ibid. See also, 9 Moore Federal Practice ¶ 110.13[2] at 157.

tween 1952 and 1969. The complaint alleges that defendants sold homes at excessive prices by engaging in racially discriminatory practices such as "blockbusting." Appellants' complaint survived a motion to dismiss, *see, Contract Buyers League, et al.* v. *F & F Investment,* 300 F. Supp. 210 (N.D.Ill. 1969)[4] and, with the issue joined, they embarked upon pretrial discovery.

In connection with its discovery, appellants deposed Alfred Balk who is, at present, editor of the Columbia Journalism Review and a lecturer at the Graduate School of Journalism of Columbia University. Approximately ten years ago, while living in Chicago, Mr. Balk wrote an article on "blockbusting" which was published in the *Saturday Evening* Post on July 14, 1962. The story, entitled "Confessions of a Block-Buster," was based upon information supplied to Mr. Balk by an anonymous real estate agent in Chicago, given the pseudonym "Norris Vitchek" for purposes of publication. The record discloses that "Vitchek" was unwilling to make his information available unless Balk and his publishers agreed not to reveal the true identity of their source. The article exposed details of real estate practices in the Chicago area including racially discriminatory activities on the part of unscrupulous landlords and real estate speculators.

At his deposition taken on June 7, 1971, it was apparent that Balk was highly sympathetic to appellants' cause and was anxious to cooperate. He indicated that he would "be happy to verify such information as you find in the article and describe such as I understand as [sic] the general mechanics of the real estate speculators' operations." He

[4] *Aff'd.* 420 F.2d 1191 (7th Cir. 1970).

went on to state that he wrote the article on blockbusting, and that it accurately reflected information provided to him by "Norris Vitchek." Balk testified that "Vitchek" was a real person but Balk was unwilling to identify him on the ground that information given by "Vitchek" was made available on a confidential basis. Balk made it clear that his refusal to disclose confidential sources was based on "the First Amendment . . . which [protects] not only the right to disseminate, but the right to gather information."

Accordingly, appellants moved under Rule 37, F.R.Civ. P., for an order compelling Balk to disclose the identity of his confidential source. Judge Bonsal, in a well-considered opinion filed prior to the Supreme Court's decision in *Branzburg* v. *Hayes (United States* v. *Caldwell), supra,* balanced the competing public and private interests involved in the case and concluded that Balk should not be required to reveal "Vitchek's" identity.

The law in this area is clearly stated. A motion seeking a discovery ruling is addressed to the discretion of the district court, and our function on appeal is to determine whether the trial judge abused his discretion in entering the challenged order, *see, e.g., Montecantini Edison S.P.A.* v. *E.I. duPont de Nemours & Co.*, 434 F.2d 70 (3 Cir. 1970); *Borden Co.* v. *Sylk*, 410 F.2d 843 (3 Cir. 1969); *Tiedman* v. *American Pigment Corp.*, 253 F.2d 803 (4 Cir. 1958). We conclude that Judge Bonsal was well within the ambit of his discretionary authority in denying appellants' motion for discovery.

Rather than rely on the Ninth Circuit Court of Appeals's decision in *Caldwell* v. *United States*, 434 F.2d 1081 (9 Cir. 1970), which established a journalist's testimonial privilege in criminal investigations conducted by the grand jury—a

ruling subsequently reversed by the Supreme Court in *Branzburg* v. *Hayes, supra*[5]—Judge Bonsal instead sought independently to ascertain the applicable federal law governing resolution of the discovery motion before him. It suffices to state that federal law on the question of compelled disclosure by journalists of their confidential sources is at best ambiguous. Although it is safe to conclude, particularly after the Supreme Court's decision in *Branzburg*, a case about which we will have more to say in Part II of this opinion, that federal law does not recognize an absolute or conditional journalist's testimonial "privilege", neither does federal law require disclosure of confidential sources in each and every case, both civil and criminal, in which the issue is raised. Absent a federal statute to provide specific instructions, courts which must attempt to divine the contours of non-statutory federal law governing the compelled disclosure of confidential journalistic sources must rely on both judicial precedent and a well-informed judgment as to the proper federal public policy to be followed in each case.

To inform his judgment concerning appropriate federal public policy in the area of a newsman's privilege, Judge Bonsal looked to both New York and Illinois statutes governing newsmen's rights. These two states—and there are others—have enacted legislation protecting a journalist from forced disclosure of his confidential sources. Both

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[5] *Caldwell* v. *United States* was decided by the Ninth Circuit on November 16, 1970. The order in this case was dated February 16, 1972. The Supreme Court decided the *Branzburg* case on June 29, 1972.

statutes[6] were enacted after the publication of Mr. Balk's

[6] N.Y. Civil Rights Law § 79-h (McKinney Supp. 1972) provides in part:

> Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network, shall be adjudged in contempt by any court, the legislature or other body having contempt powers, for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by radio or television transmission station or network, by which he is professionally employed or otherwise associated in a news gathering capacity.

The Illinois statute, Ch. 51, Ill. Rev. Stat. § 111 *et seq.* (1971), provides in part:

> No court may compel any person to disclose the source of any information obtained by a reporter during the course of his employment except as provided in this Act.

The Illinois Act provides a number of limitations on the newsman's privilege. Section 111 states that the privilege "is not available in any libel or slander action in which a reporter or news medium is a party defendant."

When a journalist claims the privilege, the party seeking information may ask the court for an order compelling disclosure, *see* § 113, by indicating, *inter alia*, the specific information sought, its relevancy to the proceedings, "and a specific public interest which would be adversely affected if the factual information sought were not disclosed," *see* § 114. In deciding such a motion, the Court is directed to consider "the nature of the proceedings, the merits of the claim or defense, the adequacy of the remedy otherwise available, if any, the relevancy of the source, and the possibility of establishing by other means that which it is alleged the source requested will tend to prove," *see* § 116. Section 117 authorizes a court to compel disclosure only if it finds, *inter alia*, "that all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved."

article, but prior to the filing of appellant's motion in the district court. In a memorandum to the Legislature approving New York's "newsman's privilege" statute, Governor Rockefeller stated:

> Freedom of the press is one of the foundations upon which our form of government is based. A representative democracy, such as ours, cannot exist unless there is a free press both willing and able to keep the public informed of all the news.
>
> The threat to a newsman of being charged with contempt and being imprisoned for failing to disclose his information or its sources can significantly reduce his ability to gather vital information . . . .
>
> . . . .
>
> . . . This legislation affords a stronger safeguard of the free channels of news communication . . . by protecting newsmen from being compelled to disclose the information they gather as well as the identity of their informants . . . .[7]

New York and Illinois State law, while not conclusive in an action of this kind, reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment, *see e.g., New York Times* v. *Sullivan*, 376 U.S. 254 (1964). Compelled disclosure of confidential sources unquestionably

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[7] McKinney's Session Laws of New York, 1970, Vol. 2 at 3112. Governor Ogilvie stated, upon signing the Illinois bill into law:

> The Act is more than a declaration of fair play for newsmen. It also assures a better informed public, for it allows reporters to seek the truth wherever it is to be found, without fear that their sources of information will be cut off by unnecessary disclosures.

Editor & Publisher, October 10, 1971, p. 14, col. 2.

threatens a journalist's ability to secure information that is made available to him only on a confidential basis—and the district court so found. The deterrent effect such disclosure is likely to have upon future "undercover" investigative reporting, the dividends of which are revealed in articles such as Balk's, threatens freedom of the press and the public's need to be informed. It thereby undermines values which traditionally have been protected by federal courts applying federal public policy.

As against these significant public and private interests, appellants urge us to consider the overriding importance of compelling testimony in judicial proceedings, *see, e.g., Blackmer* v. *United States,* 284 U.S. 421 (1932) (criminal proceeding); *Garland* v. *Torre,* 259 F.2d 545 (2 Cir.), *cert. denied* 358 U.S. 910 (1958) (libel action). This federal public policy is particularly strong, we are told, when the issue involves enforcement of federal laws in federal courts, and is even more trenchant when the case involves claims under various provisions of the civil rights acts.

This argument, we believe, goes too far, for it would require disclosure of confidential sources in every case based upon federal question jurisdiction or, at least, in every case raising a claim under the civil rights acts. We can see no justification for either a blanket rule covering all federal question cases, or for a partial rule of disclosure for all civil rights actions. It would be inappropriate for a court to pick and choose in such gross fashion between different acts of Congressional legislation, labelling one "exceedingly important" and another less so, without specific directions from the Legislature. While we recognize that there are cases—few in number to be sure—where First Amendment rights must yield, we are still mindful of the preferred position which the First Amendment oc-

cupies in the pantheon of freedoms. Accordingly, though a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest, we are of the view that there are circumstances, at the very least in civil cases, in which the public interest in nondisclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony. The case before us is one where the First Amendment protection does not yield.

We must recall that Balk was not a party to the underlying action. Moreover, Judge Bonsal stated that there were other available sources of information that might have disclosed the real identity of "Norris Vitchek," which appellants had not exhausted. The court, therefore, found that disclosure by Balk of his sources was not essential to protect the public interest in the orderly administration of justice in the courts. The true identity of "Norris Vitchek" simply did not go to the heart of appellants' case, *see Garland* v. *Torre, supra,* at 550. We believe the district court properly balanced the interests competing for recognition in this case, and that its judgment refusing to compel Balk to disclose his confidential source should be upheld.

II.

Perhaps, because the appellants did not accept the broad scope of the district court's discretion to grant or deny orders for discovery under Rule 37, they have directed their energies to establish the principle that no journalists' testimonial privilege ought to be recognized by the federal courts, relying principally upon the venerable decision by this Court in *Garland* v. *Torre, supra,* and upon the Supreme Court's recent decision in the *Branzburg* case.

supra.[8] Since the Supreme Court's decision in *Branzburg* denies the existence of a principle granting an absolute newsman's testimonial privilege, we need not tarry over that question. We are of the view, however, that the two cases just cited do not control the result reached in this case, and we briefly indicate here the reasons we hold to that view.

Garland v. *Torre, supra,* involved a libel action by the actress Jury Garland against the Columbia Broadcasting System. Marie Torre, a columnist for the *New York Herald Tribune* published allegedly defamatory statements about Miss Garland, which Miss Torre attributed to a CBS executive. At a pre-trial deposition Miss Torre refused to reveal her source, claiming a journalist's privilege under the First Amendment. The district court held her in criminal contempt and the Court of Appeals upheld the citation. The facts in the *Garland* case are wholly unlike those before us. There the record revealed that Miss Garland had taken active steps independently to determine the identity of the confidential news source. Three CBS executives were deposed: they denied making the statement in question and denied knowing the identity of the network executive referred to in the *Herald Tribune* column. In view of these denials, the identity of Miss Torre's source became essential to the libel action: in the words of this Court, it "went to the heart of plaintiff's claim." 259 F.2d at 550. Appellants in this case, however, have not demonstrated that the identity of Mr. Balk's confidential source is necessary, much less critical, to the maintenance of their civil rights action.

The ruling in *Garland* is a carefully circumscribed one. Judge Stewart of the Sixth Circuit (now Justice Stewart),

[8] For recent, but pre-*Branzburg*, discussions of newsmen's privilege *see* Kuhns, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317 (1970); Note, The Right of the Press to Gather Information, 71 Colum.L.Rev. 838 (1971).

sitting by designation in this Circuit, observed that compelled disclosure of a newsman's confidential sources unquestionably raises serious constitutional issues, and that any infringement upon First Amendment rights is justified only in view of an overriding public interest in "the right to sue and defend in the courts . . . [a] right conservative of all other rights [which] lies at the foundation of orderly government," 259 F.2d at 549, quoting *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907). The Court made it clear that its holding was strictly limited to the facts of the case, and went on to note that it was "not dealing with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality." 259 F.2d at 549-550.

Branzburg v. *Hayes* (*United States* v. *Caldwell*), *supra*, involving as it did the right of a journalist to withhold disclosure of confidential sources from a grand jury investigating criminal activities, is only of tangential relevance to this case. Mr. Justice White, writing for the majority of five justices, stated that "the sole issue before [the Court] is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." 408 U.S. at 682. No such criminal overtones color the facts in this civil case. The Court in *Branzburg*, as the Court of Appeals had done in *Garland*, applied traditional First Amendment doctrine, which teaches that constitutional rights secured by the First Amendment cannot be infringed absent a "compelling" or "paramount" state interest, *see, e.g.*, *NAACP* v. *Button*, 371 U.S. 415 (1963), and found such an overriding interest in the investigation of crime by the grand jury which "[secures] the safety of the person and property of the citizen." *Branzburg* v. *Hayes*, *supra*, at 700.

We note that Mr. Justice Powell, in a separate concurrence, emphasized the limited nature of the Court's holding, and expressly stated that in his view *Branzburg* did not compel a journalist "to give information bearing only a remote and tenuous relationship to the subject of the [grand jury] investigation." *Id.* at 710. Significantly, he said that even in criminal proceedings, "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Ibid.*

Manifestly, the Court's concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes *Branzburg* from the case presently before us. If, as Mr. Justice Powell noted in that case, instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure.

It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free so too will a people remain free. Freedom of the press may be stifled by direct or, more subtly, by indirect restraints. Happily, the First Amendment tolerates neither, absent a concern so compelling as to override the precious rights of freedom of speech and the press. We find no such compelling concern in this case. Accordingly, it is our view that the district court properly exercised its discretion in refusing to order Mr. Balk to disclose the identity of his journalistic source.

Affirmed.

APPENDIX B

CHARLES BAKER ET AL.,

PLAINTIFFS,

V.

F & F INVESTMENT ET AL.,

DEFENDANTS.

United States District Court,
Southern District of New York.
February 16, 1972.

BONSAL, District Judge.

Plaintiffs move for an order pursuant to Rule 37 of the Federal Rules of Civil Procedure compelling the witness Alfred Balk to answer questions propounded to him during oral deposition taken on June 7, 1971 pursuant to subpoena.

On July 14, 1962, the *Saturday Evening Post* published an article written by Alfred Balk entitled "Confessions of a Block-Buster—A Chicago real-estate agent who moves Negro families into all-white blocks reveals how he reaps enormous profits from racial prejudice", "By Norris Vitchek as told to Alfred Balk." Mr. Balk's article describes "block-buster" activities in the Chicago area, charging unscrupulous landlords and real estate agents with preying upon the Negroes of that city. At the time he wrote his article, Mr. Balk was a resident of Illinois. He has since moved to New York, where he was served with a subpoena by the plaintiffs to take his deposition.

Mr. Balk's testimony is sought in connection with plaintiffs' discovery in a class action pending in the Northern District of Illinois. The details of the Chicago action are

described in an opinion of Judge Will reported at 300 F. Supp. 210 (N.D.Ill., E.D. 1969) under the title, Contract Buyers League et al., Plaintiffs, v. F & F Investment et al., Defendants, No. 69 C 15. Plaintiffs, suing as a class, had previously been granted the right to maintain a class action under Rule 23 of the Federal Rules of Civil Procedure. Judge Will denied defendants' motions to dismiss Count I charging defendants with violation of the Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982, 1983 and 1985(3)) and of the Thirteenth and Fourteenth Amendments to the United States Constitution; Counts II and III charging violations of the Federal antitrust laws and of the antitrust laws of Illinois; and Count V charging violation of the Illinois common law (on the ground of pendent jurisdiction to Counts I, II and III).

At the deposition, Mr. Balk testified that he wrote the article; that the name "Norris Vitchek" was fictitious; that he had an interview with a man to whom he gave the fictitious name of Norris Vitchek; that his interviews took place during the year 1962; that the interviews took place in Chicago or Evanston, Illinois; and that Norris Vitchek was one man. Mr. Balk refused to answer questions as to the identity of the man called Norris Vitchek or as to how many times he had interviewed him, or whether he was a Chicago resident or whether he had disclosed his true identity to anyone else. In refusing to answer these questions, Mr. Balk stated that his answers "might tend to reveal the identity of the author, which I and the editors of the magazine are sworn not to do, as journalists, because that was the condition of our obtaining the article." Mr. Balk stated that he took this position "under the First Amendment, which protects freedom of the press, which includes not only the right to disseminate, but the right to gather information."

Plaintiffs contend that disclosure of Mr. Balk's source is essential to their discovery in the Chicago action. Plaintiffs rely on Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958), where the Court of Appeals, in an opinion by Judge Stewart, now Mr. Justice Stewart, held that in a libel action brought by Judy Garland against Columbia Broadcasting System Inc. (CBS), Marie Torre, a newspaper columnist who had printed the alleged defamatory remarks in her column and attributed them to a CBS executive, could be compelled to reveal her source.

However, *Torre* is not dispositive here. In *Torre,* Miss Garland charged that CBS "had made false and defamatory statements about her and authorized, requested and induced their publication in newspapers and elsewhere." *Torre, supra* at 547. CBS, in depositions of two of its executives, denied that it made or caused the defamatory statements to be published in Miss Torre's column, so that the source of the statements in Miss Torre's article was essential to Miss Garland's libel action. The court noted that:

> ". . . [W]e are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality. . . . The question asked of the appellant [Torre] went to the heart of the plaintiff's claim. We hold that the Constitution conferred no right to refuse an answer."

Plaintiffs here do not claim that Mr. Balk was a party to the alleged deprivation of their rights. On the contrary, Mr. Balk's article first brought to the public's attention the

alleged violation of plaintiffs' rights. Plaintiffs' purpose in seeking to require Mr. Balk to disclose his source is to aid them in their discovery in putting the finger on one of the alleged wrongdoers.

Mr. Balk relies on Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), cert. granted, 402 U.S. 942, 91 S.Ct. 1616, 29 L.Ed.2d 109 (1971), where the Court of Appeals for the 9th Circuit held that a newspaper reporter could not be compelled to appear and testify before a Grand Jury investigating alleged criminal activities attributed to the Black Panther movement since this would require the reporter to disclose his sources of information, which he had promised not to disclose. Balk urges that *Caldwell* is "clearly the leading federal case on the question presented", and therefore, that federal case law provides him with a journalist's privilege not to disclose his source.

Balk's reliance on *Caldwell* is misplaced since the Ninth Circuit Court of Appeals took pains to explain that

> ". . . the rule of this case is a narrow one. It is not every news source that is as sensitive as the Black Panther Party has been shown to be respecting the performance of the 'establishment' press or the extent to which that performance is open to view. It is not every reporter who so uniquely enjoys the trust and confidence of his sensitive news source." (p. 1090)

Moreover, *Caldwell* was dealing with a Federal Grand Jury proceeding where the government had an interest not here present. The court held only that—

> "[W]here it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand

> Jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judicial process properly can issue to require attendance." (p. 1089)

Since plaintiffs allege violations of their Federal constitutional rights, the issue must be resolved under Federal law. However, in making its determination, the court will consider state public policy. See Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. den., 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971). Both Illinois and New York now have statutes protecting a newspaper reporter from being required to disclose his source. (New York Civil Rights Law, McKinney's Consol.Laws, c. 6, Section 79-h effective May 12, 1970; 51 Smith-Hurd Illinois Annotated Statutes, Section 111 et seq., effective September 23, 1971.) Both statutes were enacted after the publication of Mr. Balk's article, but before the bringing of this motion. In determining the issue under Federal law, it is immaterial whether the Illinois or New York, or both statutes are considered since both enunciate substantially the same public policy. *Compare* Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964).

The New York Civil Rights Law, Section 79-h(b) provides in pertinent part as follows:

> ". . . [N]o professional journalist . . . shall be adjudged in contempt by any court . . . for refusing or failing to disclose . . . the source of any such news coming into his possession in the course of gathering or obtaining news for publication . . . in a newspaper, magazine, or for broadcast by a radio or television transmission station or network, by which he is pro-

fesionally employed or otherwise associated in a news gathering capacity.'"*

The Illinois statute provides that:

> "No court may compel any person to disclose the source of any information obtained by a reporter during the course of his employment except as provided in this Act."

The Illinois statute follows the teaching of *Torre* in providing that the privilege is not available in a libel or slander action in which a reporter is a party defendant. The Illinois statute also provides for a "divestiture" of the privilege of an application to the court in the county where the information is sought divesting the reporter of the privilege and ordering him to disclose his source of information. Before the privilege can be "divested", the court must find that all other available sources of information have been exhausted and that disclosure of the information sought is essential to the protection of the public interest involved.

In *Torre, supra* at 548, the issue of whether a reporter should be required to disclose his source turns on "whether the interest to be served by compelling the testimony of the witness in the present case justifes some im-

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* In construing the New York statute, the Supreme Court, New York County, recently held:

> ". . . [I]n order to raise successfully the claim of privilege, two essential elements must be established; First, the information or its sources must be imparted to the reporter under a cloak of confidentiality, i. e. upon an understanding, express or implied, that the information or its sources will not be disclosed; and second, that the information or its sources must be obtained in the course of gathering of news for publication." Matter of Wolf and the Village Voice, Inc., N.Y.L.J., Jan. 27, 1972, Birns, J.

pairment of this [freedom of the press] First Amendment freedom." A reporter does not have an absolute right under the First Amendment not to disclose his source, based on "the public's right to know", since the public is given no corresponding protection that the reporter is reporting his source correctly or that the "source" is not a subterfuge. On the other hand, if a reporter is required in all cases to disclose his source, his sources would inevitably dry up, particularly where the information was received in confidence, with the consequence that the freedom of the press and the public's right to know would be impaired.

Plaintiffs have not shown that all other available sources of information have been exhausted or that the disclosure of his source by Mr. Balk is essential to the protection of the public interest involved. The facts related in Mr. Balk's article and the pictures therein certainly provide leads to the plaintiffs in obtaining discovery. Further relevant information could be obtained by a search of the title records and the mortgage records in the county in which plaintiffs claim the unlawful activities took place.

Balancing these interests in this case, and the belief that plaintiffs have other ways of obtaining the information which they seek, the court concludes that Mr. Balk should not be required to disclose his confidential source. This determination is consistent with the First Amendment and the public policy of Illinois and New York. Therefore, plaintiffs' motion for an order compelling Mr. Balk to answer the questions propounded to him at his deposition is denied.

It is so ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of December one thousand nine hundred and seventy-two.

Present: Hon. J. Joseph Smith,
Hon. Irving R. Kaufman,
Hon. William H. Mulligan,
Circuit Judges,

Charles Baker, et al.,

Plaintiffs-Appellants,

v.

F & F Investment, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CONTRACT BUYERS LEAGUE, an unincorporated voluntary association, Charles and Charlene Baker, et al.,

Plaintiffs,

v.

F & F INVESTMENT, et al.,

Defendants.

COMPLAINT*

THIRTEENTH AND FOURTEENTH AMENDMENTS AND FEDERAL CIVIL RIGHTS ACTS.

Jurisdiction and Venue

1. This action arises under the provisions of 42 U.S.C. §§ 1981, 1982, 1983, 1985 (3) and the Thirteenth and Fourteenth Amendments to the United States Constitution. Plaintiffs invoke this Court's jurisdiction under the provisions of 28 U.S.C. § 1343. Defendants performed the acts alleged in this count within the Northern District of Illinois, Eastern Division, and plaintiffs' claims arose therein.

* The portions of the Complaint not reproduced here set forth allegations of violations of federal and state antitrust laws, federal securities laws, grounds of unconscionability, fraud, usury, and breach of implied warranties, and add as defendants various federal agencies involved in the housing field.

The Plaintiffs

2. Plaintiffs bring this action on their own behalf, and as a class action on behalf of others similarly situated ("members of the class") in accordance with the provisions of Rule 23 of the Federal Rules of Civil Procedure. The members of the class are so numerous that it is impracticable to bring them all before the Court. Plaintiffs will fairly insure the adequate representation of all members of the class. The claims of the individual plaintiffs are typical of the claims of all members of the class. Several hundred of them have banded themselves together to seek a remedy for their common problem, under the name Contract Buyers League. There are common questions of law or fact affecting the several rights which this action seeks to enforce, and common relief is sought. The prosecution or defense of separate actions by the individual plaintiffs would entail substantial additional expense, and create a risk of inconsistent or varying adjudications with respect to members of the class which would establish incompatible standards of conduct for defendants. The defendants have acted toward plaintiffs and other members of the class on grounds generally applicable to the class, as is more fully set forth below. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

3. Each of the individual plaintiffs and each of the members of the class is a resident of Chicago, Illinois, a citizen of the United States of America, and a member of the Negro race.

4. Each of the individual plaintiffs and each of the members of the class has executed an instalment contract

with one of the defendants under which the plaintiff agreed to purchase specified real property and the improvements thereon in the City of Chicago, Illinois.

(a) As used herein, the term "instalment contract" refers to a contract for the purchase of real estate and the improvements thereon, upon monthly payments extending over a period of years usually in excess of 20 years. The instalment contracts purport to provide that the buyer has no interest, legal or equitable, in the property, until all payments are made; that the buyer is to make payments of principal and interest (usually 6 to 7%), and deposits for taxes and fire and extended coverage and public liability insurance; that the buyer is obligated to make all necessary repairs and improvements on the property; that if the buyer fails to make any payment called for in the contract, the seller has the option to forfeit and retain as liquidated damages all monies theretofore paid to the seller, and take possession of the property from the buyer through state court process; and that the seller shall not be obligated to deed the property to the buyer until all instalments are paid, though some of the contracts provide that when the buyer has paid sufficient instalments so that the principal balance due is reduced to one-half of the contract price (an amount substantially in excess of the seller's investment in the property), the buyer shall be entitled to a deed to the property. The title conveyed to the buyer, however, would be subject to any outstanding mortgage or lien on the property which the seller may have created, and to a mortgage to the seller in the amount of the unpaid principal contract balance. . . .

(c) As used hereinafter, the word "plaintiffs" refers collectively to the named plaintiffs and to the members of the group who plaintiffs represent.

The Defendant-Sellers and Realtors

5. (a) Defendants F & F Investment, Moe Forman, Estate of Lou Fushanis, Lee Investment Co., Herbert Liss, Time Realty Co., Joseph D. Berke, Bernard Friedman, Albert Berland, Sureway Investment Corp., John Karras, Irwin Spector Real Estate, Irwin Spector, Marshall Real Estate Co., Marshall Berke, Eric Reefer, Community Realty Inc., Weiss Realty Co., Jay Goran, individually and as trustee under trust agreement No. 4647, United Investment Co., Home Real Estate, Estate of Louis Morris, Lillian Morris, W. F. Smith & Co., W. F. Smith, Marvin A. Marder, A. Weinberg Realty Inc., Al Weinberg, Duke Weinberg, Howard Realty & Management Co., Howard Samotny, Charles Lasko, Action Realty Co., Austin Bond & Mortgage Co., Lester Yavitz, Jerry Yavitz, Kossack Real Estate, M. J. Kossack, Summerower Real Estate, Supreme Life Insurance Co., Lincoln Investment Co., Irving Liss, Mary C. Gehl, Frank Brogni, LaSalle National Bank as Trustee under Trust Agreements Nos. 22946, 21056, The Lawndale National Bank of Chicago as Trustee under Trust Agreements Nos. 3651, 3234, 3471, 2783, 3022, 2803, 2860, 3830, 2986, 2620, Chicago National Bank as Trustee under Trust Agreements Nos. 13245, 15536, Thomas J. Sullivan individually and as Trustee under Trust Agreements Nos. 12, 32, American National Bank as Trustee under Trust Agreements Nos. 15798, 23503, The Cosmopolitan National Bank of Chicago as Trustee under Trust Agreements Nos. 11110, 5433, 9896, 10085, 7660, 7760, Sears Bank & Trust Co., as Trustee under Trust Agreements Nos. 700149, 700221, Guaranty Bank & Trust Company as Trustee under Trust Agreement No. 9822, Contral National Bank as Trustee under Trust Agreement No. 4087, and Exchange National Bank as Trustee under Trust

Agreements Nos. 11645, 11481, 13402, are now and at all times material to this case have been doing business in the Northern District of Illinois and elsewhere. They are hereinafter referred to collectively as "defendant-sellers."

(b) Defendant-sellers are real estate speculators and their agents who purchased those properties solely for purposes of resale, in order to reap from members of the Negro race large and unjust profits through the illegal means set forth in this complaint, and the defendant-sellers have done so and are continuing to do so.

(c) Each of the defendant-sellers sold one or more parcels of real property and the improvements thereon on instalment contract to one or more of the plaintiffs, as summarized in Exhibit 1 to this complaint, and to one or more members of the class.

(d) Some of the defendant-sellers have assigned their rights under the instalment contracts to one or more of the defendant-assignees . . . .

The Defendant-Assignees

6. (a) Defendants F & F Investment, Moe Forman, Estate of Lou Fushanis, All-Scott Realty, George Waldman, Action Realty Co., Charles Lasko, Irwin Spector Real Estate, Irwin Spector, Sureway Investment Corp., John Karras, Austin Bond & Mortgage Co., Lester Yavitz, Jerry Yavitz, United Investment Co., Lincoln Investment Co., Irving Liss, Albert Berland, G. Balin, Inc., Thomas J. Sullivan, The Allied Credit Service, Ralph Erlich, Best Realty Co., Al Weinberg, Duke Weinberg, M. E. Stein & Co., M. E. Stein, Value Finance Corp., General Federal Savings & Loan Association, Vladimar Protz, Alex Salb, Harold A. Harris as Trustee under Trust Agreement No. 3239, Joseph

Noren and Sapoznik Realty Co. are now and at all times material to this case have been doing business in the Northern District of Illinois and elsewhere. They are hereinafter referred to collectively as "defendant-assignees."

(b) Each of the defendant-assignees has acquired by purchase or otherwise an assignment of the rights of one or more of the defendant-sellers under one or more instalment contracts executed by one or more of the plaintiffs, well knowing of the unlawful conduct engaged in by defendant-sellers as described in this complaint. Defendant-assignees have used and continue to use the instalment contracts and the provisions thereof to intimidate, threaten, exploit and reap large and unjust profits from members of the Negro race.

The Defendant-Lenders

7. (a) Defendants Ashland Savings & Loan Association, Bellwood Savings & Loan Association, First Mutual Savings & Loan Association, Property Federal Savings & Loan Association, Atlas Federal Savings & Loan Association, Prospect Federal Savings & Loan Association, United Savings & Loan Association, Service Savings & Loan Association, Western Federal Savings & Loan Association, Capitol Federal Savings & Loan Association, Calumet Federal Savings & Loan Association, First State Savings & Loan Association, and Reliance Federal Savings & Loan Association are now and at all times material to this case have been doing business in the Northern District of Illinois and elsewhere. There are hereinafter refrred to collectively as "defendant-lenders."

(b) Each of the defendant-lenders is a savings and loan institution whose accounts were at all material times insured by the Federal Savings and Loan Insurance Corpo-

ration, an agency and wholly-owned corporate instrumentality of the United States.

(c) Each of the defendant-lenders made one or more mortgage loans to one or more of the defendant-sellers in order to enable defendant-sellers to acquire property, knowing that defendant-sellers did not intend to reside on the property but that they intended to resell the property to Negroes under instalment contracts at prices far in excess of its appraised value.

(d) At the same time that or shortly after said loans were made, defendant-sellers resold the property to one or more of the plaintiffs under instalment contract.

(e) Defendant-lenders knowingly and willingly aided, abetted and encouraged the defendant-sellers in the commission of the wrongful acts described herein.

8. Plaintiffs bring this action against defendants and all others similarly situated as a class action in accordance with the provisions of Rule 23 of the Federal Rules of Civil Procedure. The members of the class are so numerous that it is impracticable to bring them all before the Court. Defendants will fairly insure the adequate representation of all members of the class. The positions of the defendants are typical of all members of the class. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

The Custom and Usage of Residential Racial Segregation In Chicago and Environs

9. (a) For many years prior to 1958, and at all times material to this case, there has existed a custom and usage of residential racial segregation in Chicago, Illinois and its environs, pursuant to which Negro citizens may purchase and rent residences only in limited geographical areas, and then only in areas predominantly inhabited by other Negroes.

(b) Since 1910 the population of the City of Chicago has been increased by more than 1,300,000 people. During the same period the Negro population increased by more than 850,000 or from about 2% of the total to nearly 25% of the total. During the period when the purchases of property were made by plaintiffs, approximately 3.5 million people were living in the City of Chicago, of which more than 900,000 were Negroes. An overwhelming number of these Negro citizens lived in blocks which were 90% to 100% Negro occupied.

(c) Through a combination of real estate and lending practices, restrictive covenants and their judicial enforcement by the State and local courts, a general community custom and usage of racial residential racial segregation was created and enforced in the City of Chicago and its environs, and the opportunity of Negroes to buy or rent residential property in Chicago and its environs was and is limited to certain areas, the total of such areas being substantially less than one-fourth of that area of Chicago and its environs which is devoted to residential housing. As a matter of custom and usage in the suburban area surrounding Chicago, Negroes were and are completely excluded from residence or were limited to small, less desirable geographical areas.

(d) Long before 1958, this custom and usage of residential racial segregation in Chicago and environs had become an established custom and usage of the City of Chicago, of the County of Cook, and of the State of Illinois.

(e) This custom and usage of residential racial segregation was well known to and was participated in, advanced and supported by the defendants and groups to which they belonged, in their buying, selling, renting and lending practices.

(f) The result of this aforesaid custom and usage was the creation of an artificial scarcity of residential housing available to Negroes in Chicago and its environs, and a corresponding unsatisfied demand among Negroes for residential housing in Chicago and its environs. Defendants and each of them sought to and did exploit this artificial scarcity produced by the custom and usage of racial residential segregation in the manners and by the means described in this complaint, and in other manners and by other means, for the profit and benefit of the defendants, and to the great harm and detriment of the plaintiffs.

(g) As a result of this custom and usage, Negroes have been and are confined disproportionately to the worst housing in Chicago and its environs. They have been forced to reside and remain residents of a racially segregated area which is inferior to those areas in Chicago and environs which are populated by white citizens in many material respects, including but not limited to:

(i) Inferior services for protection of themselves, their families and their property, including fire and police protection.

(ii) Increased risk of harm to themselves, their families and their property.

(iii) High insurance rates for insurance to protect against fire and extended coverage, theft, damage and public liability.

(iv) Inferior recreational facilities, sewage and garbage disposal, water supply, street maintenance, transportation, and other public services.

(v) Inferior schools for plaintiffs' children, and the resulting inferior education and preparation for life.

(vi) Excessive charges for food, clothing, and building repairs.

(vii) Unfair and discriminatory application of the local building codes.

(viii) Higher rentals and sales prices for the same property than were paid by whites who previously rented or purchased the property.

(h) As a further result of the aforesaid custom and usage, Negroes were and are unable to obtain commercial financing from banks, savings and loan associations and other lending institutions with which to purchase residential real estate. The Federal Housing Administration (FHA) would not insure mortgage loans for Negro purchasers of real estate in areas principally inhabited by members of the Caucasian race, or in "racially changing" neighborhoods, and generally would not do so in neighborhoods principally occupied by Negroes. Defendant-lenders and other lending institutions in and around Chicago would make mortgage loans to Negroes, if at all, only upon terms that were substantially more stringent and difficult than those imposed upon white citizens. Negroes were and are therefore forced to accept and execute instalment con-

tracts, such as those executed by plaintiffs, which call for the payment of excessive prices, which contain unlawful and unconscionable provisions, and through which usurious rates of interest are extracted from them, and in which the sellers have concealed the true ownership of the property through the use of nominees and land trusts.

(i) As a further result of said custom and usage, Negro purchasers of residences, such as plaintiffs, were and are subjected to misrepresentations made by the sellers concerning the compliance of the property with the local building codes, and concealment by the sellers of violations of the building codes.

The Conspiracy and Civil Wrongs

10. Prior to 1958, the properties involved herein were populated almost exclusively by members of the Caucasian race, and Negro citizens were segregated and excluded from the area pursuant to the custom and usage alleged above.

11. Plaintiffs were desirous of purchasing two and three-story residence buildings in the Chicago area to provide homes in which to raise their families, and to provide income-producing property to assist in making the payments for the property by renting the additional space in the building to tenants.

12. (a) Plaintiffs have had little formal education. They were unsophisticated and uneducated in matters dealing with purchase and sale of real estate. Most of the plaintiffs had never contracted to buy real estate before. They were susceptible to exploitation and unfair treatment.

(b) Defendant-sellers and their agents were sophisticated in matters of the purchase and sale of real estate.

They were aware of plaintiffs' lack of education and experience. Several of the defendants and their agents were and are lawyers. There was a gross inequality of bargaining position and power between the plaintiffs on the one hand and the defendant-sellers on the other hand. Being aware of this inequality, defendant-sellers induced plaintiffs to trust, rely upon and impose confidence in defendant-sellers and their agents, and to believe in their integrity and the truthfulness of their representations.

13. Beginning at a date unknown to plaintiffs, but prior to January 1, 1958, and continuing until the present, the defendants individually and in conspiracy with one another, knowingly and willfully, and for the purpose of deceiving and defrauding plaintiffs and others, and of depriving plaintiffs and other members of the Negro race of their constitutional and statutory rights:

(1) Continued and promoted the custom and usage of residential racial segregation in Chicago and environs.

(2) Exploited the custom and usage of residential racial segregation to the detriment of plaintiffs and to the profit of defendants.

(3) Utilized the system of state and local laws and courts to enforce and threaten to enforce the custom and usage of residential racial segregation to the detriment of plaintiffs and to the profit of defendants.

14. In carrying out their wrongful course of conduct, defendants and others whose identities are presently unknown to plaintiffs acted under color of the laws of Illinois and of its municipalities, and and under color of the custom and usage of residential racial segregation alleged above. They also made use of the laws and customs of the State of Illinois, the County of Cook and the City of Chicago

which (i) provide machinery for recording and regulating transfers of title to realty in Illinois, (ii) regulate the use and occupancy of realty in Illinois, (iii) impose taxes upon transfers of title and the use and occupancy of real estate in Illinois, (iv) provide for and permit the holding of title to Illinois realty in "land trust" or in the names of nominees, so that the true ownership of realty is disguised and hidden, (v) provide supervisory services to protect realty and its occupants in Illinois, and (vi) provide a system of courts to enforce contracts relating to the purchase and use of realty in Illinois, including contracts such as the instalment contracts involved in this case and in the case of any default thereunder to declare forfeitures and secure possession of the property for the contract-seller.

15. In carrying out the aforesaid wrongful course of conduct, and as a direct and proximate result of the custom and usage set forth above, and in furtherance of that custom and usage, defendants performed the following acts:

(a) Defendant-sellers obtained title to the properties involved herein at prices below the sale prices of comparable housing units in other areas of Chicago and environs because the whites who owned and occupied the properties were frightened and stampeded into selling their property to defendant-sellers by reason of representations made by them and of rumors they had heard (1) that Negroes were about to purchase or had purchased property in the area; (2) that the result would be that all non-Negroes would leave the area; (3) that this would cause a substantial reduction in the market value of property in the area; and (4) that this would render residence and ownership of property in the area undesirable and unsafe for non-Negroes. Plaintiffs are informed and believe that some of the defendant-sellers made such representations to the owners of the properties and spread such rumors.

(b) The defendant-sellers were aided and encouraged in their efforts thus to obtain title to the properties involved herein by the mortgage loans made upon the properties by the defendant-lenders. At the time defendant-lenders made said loans to defendant-sellers, defendant-lenders knew that defendant-sellers did not intend to reside in the properties, and that they intended promptly to resell the properties to members of the Negro race. In some cases, the mortgage loans made by defendant-lenders to defendant-sellers were closed at the same time and place as the execution of the instalment contract between defendant-sellers and the plaintiff-contract purchaser. Plaintiffs are informed and believe that in many instances, to the knowledge and through the connivance of defendant-sellers and defendant-lenders, false and excessive appraisals on the properties were procured and made a part of the defendant-lenders' files, and mortgage loans were made by defendant-lenders to defendant-sellers in excess of the value of the mortgaged property, in violation of 18 U.S.C. §§ 2,657,1005, 1006, 1341 and 1343.

(c) In most instances, the amounts of said mortgage loans were such that the defendant-sellers put little or no money of their own into the subject property.

(d) The mortgages were then recorded by the defendant-lenders under the Illinois system for recording of such documents, and became a charge against and lien upon the property involved.

(e) The defendant-sellers then resold the property on instalment contracts to plaintiffs, usually within a short period of time. In so doing the defendant-sellers knew and took advantage of the fact that Negroes were and are unable to obtain conventional financing, as set forth in paragraph 9(h) above.

(f) Defendant-sellers resold the property to Negro purchasers, such as plaintiffs, on instalment contracts at prices far in excess of the cost and fair value of the property or comparable property in other areas of Chicago and environs, at interest rates in excess of the rates then current in the market, thus diminishing the purchasing power of Negro citizens' money in comparison to the purchasing power of non-Negro citizens, and collecting what in practical effect was a race tax imposed upon plaintiffs as a corrollary to and an inevitable result of the custom and usage of residential racial segregation explained above.

(g) Defendant-sellers deliberately concealed from plaintiffs the amounts of the purchase prices which defendant-sellers had paid or agreed to pay to the former owners of the property, and the amounts of the appraisals on the property which defendant-sellers had obtained in connection with the mortgage financing they had arranged with the defendant-lenders. A comparison of the prices which plaintiffs believe defendants paid for the property, and the prices called for by the instalment contracts executed by plaintiffs, is set forth in Exhibit 1 to this complaint.

(h) Defendant-sellers presented plaintiffs with printed and mimeographed form contracts, containing the purchase price and terms of payment. In most instances in which plaintiffs or their representatives, if any, attempted to negotiate price or terms of payment, or other provisions of the contracts, defendant-sellers took advantage of the scarcity of residential housing available for Negroes, the unequal bargaining position of the parties, and of the aforesaid custom and usage of residential racial segregation, and discouraged the attempt or refused to negotiate or revise the form contract in any way.

(i) Defendant-sellers included provisions in the instalment contracts which were unlawful, unjust and unconscionable, including provisions that upon any default in payments by plaintiffs, defendant-sellers were entitled to apply to the courts of Illinois to enforce those contracts, to evict plaintiffs from the property, and to declare that all monies previously paid by plaintiffs were forfeited and were to be retained by defendant-sellers. The contracts recited that defendant-sellers were entitled to retain such monies as liquidated damages, whereas in fact these provisions called for the imposition of penalties upon plaintiffs.

(j) Defendant-sellers extracted from plaintiffs unlawful and usurious rates of interest through the devices and subterfuges of (i) charging plaintiffs excessive amounts for insurance, (ii) charging plaintiffs for commissions for obtaining insurance, (iii) collection of deposits for real estate taxes many months prior to the time the taxes were due or paid; (iv) charging plaintiffs excessive amounts for so-called closing costs, and (v) increasing the purchase prices to amounts far in excess of the fair value of the properties. The real purpose and effect of the transaction was to provide for excessive and usurious rates of interest to be taxed against and paid by plaintiffs.

(k) Defendant-sellers falsely represented to many of the plaintiffs that the properties were in compliance with the local building codes, and they concealed from plaintiffs the existence of violations of the municipal building code which substantially impaired and reduced the value of the property, and which later required either (i) the expenditure of substantial funds by plaintiffs in order to meet the requirements of said ordinances, or (ii) that plaintiffs cease the use of a portion of the property for income-producing rental purposes.

(l) Defendant-sellers and defendant-assignees in many cases have not included plaintiffs' names in the policies of insurance relating to the properties, although plaintiffs have paid defendant-sellers and defendant-assignees for those policies; and in many cases of loss or damage, defendant-sellers and defendant-assignees have made claims under and collected proceeds upon said insurance policies but have not paid or credited those proceeds to plaintiffs.

(m) Defendant-sellers concealed the true ownership of the property and existence of the conspiracy from plaintiffs and from concerned citizens and public officials of the City of Chicago, the County of Cook, the State of Illinois and the United States of America.

16. Plaintiffs are informed and believe that in those instances in which defendant-sellers made any cash outlay in order to acquire the property, they recovered that outlay within one or two years.

17. (a) Since the time of the execution of the instalment contracts and until December 1, 1968, plaintiffs paid and defendant-sellers and defendnat-assignees collected the monthly payments called for by the contracts. In many instances the amounts already paid by plaintiffs equal or exceed the fair value of the property involved at the time of execution of the instalment contract, although the instalment contracts require plaintiffs to continue to make monthly payments thereunder for many years to come, so that plaintiffs will pay from two to three times the fair value of the properties involved. Plaintiffs also expended large sums of money to improve the aforesaid properties, including improvements which defendant-sellers had falsely led plaintiffs to believe would not be required in order to bring the properties into compliance with the Chicago Building Code.

(b) In many instances, defendant-sellers have assigned their rights under the aforesaid instalment contracts to defendant-assignees, in consideration for a payment of cash, thus providing defendant-sellers with a large profit. Defendant-assignees, with knowledge of the aforesaid custom and usage, and of the wrongful course of conduct of defendant-sellers and defendant-lenders, accepted the benefits of said contracts and continue to do so.

(c) Plaintiffs are informed and believe that defendant-assignees acquired said instalment contracts from defendant-sellers at substantial discounts from the principal amounts due thereunder, thus affording excessive and usurious profits and interest to both defendant-assignees and to defendant-sellers.

(d) As of December 1, 1968, most of plaintiffs have withheld payments under the aforesaid instalment contracts, pending the outcome of this case. The Contract Buyers League has collected the amounts withheld, and plaintiffs offer to deposit said funds and all future moneys withheld with the Clerk of this Court or a corporate depository to be selected or approved by this Court.

(e) Defendant-sellers and defendant-assignees have threatened to proceed under the terms of said contracts by applying to the Illinois courts for orders evicting plaintiffs from the properties and declaring that all monies paid by plaintiffs under said contracts are forfeited and may be retained by defendant-sellers and defendant-assignees. Plaintiffs fear that unless this Court grants the relief prayed herein, the Illinois courts will enter orders as aforesaid pursuant to the terms of the instalment contracts. Many of the plaintiffs have received notices of forfeiture and default, and have been threatened with eviction and forfeiture. Typical examples of such notices are attached hereto as Exhibits 5 and 6.

(f) Defendants, individually and by agreement and conspiracy with each other, have secreted the existence of their wrongful course of conduct and of the conspiracy, and have not disclosed their existence to plaintiffs or other persons. The wrongful course of defendant's conduct and the conspiracy are still in effect, and the aforesaid wrongful purposes are still being pursued, effected and profited from by defendants.

18. In committing the wrongful acts set forth in paragraphs 9 and 10 above, defendants individually and in conspiracy with one another have:

(a) Willfully and wrongfully deprived plaintiffs of their rights under the Thirteenth Amendment to the United States Constitution, and subjected plaintiffs to conditions of racial inferiority which is a badge and indicia of slavery prohibited by that Amendment.

(b) Willfully and wrongfully deprived plaintiffs of their rights to equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and of 42 U.S.C. § 1985 (3).

(c) Willfully and knowingly deprived the Negro plaintiffs of their rights to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, in violation of 42 U.S.C. § 1981.

(d) Willfully and wrongfully prevented plaintiffs from having and exercising the same right as is enjoyed by white citizens to purchase and hold real property, in violation of 42 U.S.C. § 1982.

(e) Willfully and wrongfully, under color of the laws, customs and usages described above, subjected plaintiffs to deprivations of their rights and privileges under the

Thirteenth and Fourteenth Amendments to the United States Constitution, and under 42 U.S.C. §§ 1981, 1982 and 1985(3), in violation of 42 U.S.C. § 1983.

19. As a direct and proximate consequence of the conspiracy and wrongful acts set forth above, the following damages resulted to plaintiffs:

(a) Plaintiffs were deprived of conventional financing for the purchase of residences.

(b) Plaintiffs were induced to deal and enter into contracts with non-resident white speculators who had conspired to exploit and unfairly profit from members of the Negro race who desired to purchase residences in Chicago and its environs.

(c) Plaintiffs were induced to execute instalment contracts containing unconscionable provisions and providing for excessive and unconscionable prices far in excess of the value of the property involved.

(d) Plaintiffs were induced to execute contracts calling for the payment of excessive and usurious rates of interest.

(e) Following execution of the contracts, many of the plaintiffs were forced to make extensive and expensive repairs to the property in order to bring them into compliance with the municipal building codes, or to cease the use of a portion of the property for income-producing rental purposes.

(f) By reason of the excessive monthly payments called for by the instalment contracts, the wives and children of the parties involved were often required to obtain employment, with the resulting deterioration of the family and home life and lack of proper supervision of the parties' children.

(g) By reason of the excessive payments called for by the instalment contracts, plaintiffs were in many instances unable to afford to pay for the necessary repairs and upkeep of the property, resulting in deterioration of the property and thereby of the area and substantial reductions in the market value of the property.

(h) Plaintiffs have been forced to reside and to remain residents of a racially segregated area which is inferior to areas in Chicago and environs populated by white citizens in many material respects, including but not limited to:

(i) Physically inferior properties as compared to properties available to white citizens.

(ii) Overcrowded physical facilities.

(iii) Inferior services for the protection of plaintiffs, their families and their property, including fire and police protection.

(iv) Increased risk of harm to themselves, their families and their property.

(v) High insurance rates for insurance to protect against fire and extended coverage, theft, damage and public liability.

(vi) Inferior recreational facilities, sewage and garbage disposal, water supply, street maintenance, transportation, and other public services.

(vii) Inferior schools for plaintiffs' children, and the resulting inferior education and preparation for life.

(viii) Excessive charges for food, clothing and building repairs.

(ix) Unfair and discriminatory application of the Chicago Building Code.

(i) By reason of the provisions in the contracts purporting to provide that the buyer acquired no equity in the property unless and until all instalments were paid, and that all payments were to be forfeited in the event any instalment was not paid, and because of the excessive amounts called for in the contracts, plaintiffs were unable to sell their rights under the contracts, and plaintiffs were thereby forced and required, in many cases against their wishes and desires, to remain, in involuntary financial servitude, as residents of the area in which the property is located, although, owing largely to the conditions created by the matters set forth in the complaint, the area had become an undesirable place in which to live and to raise children.

(j) Plaintiffs have suffered discrimination solely on the basis of their Negro race and loss and impairment of their civil rights as guaranteed by the United States Constitution and the statutes of the United States. They have been subject to the aforesaid indicia and badges of slavery as a direct and proximate result of the wrongful conduct of defendants as alleged herein.

(k) The value and purchasing power of plaintiffs' money has been diminished and decreased in comparison to the value and purchasing power of the money of white citizens.

(l) Plaintiffs are threatened with actions by defendant-sellers and defendant-assignees in the courts of Illinois seeking court orders for eviction of plaintiffs and their families, and their tenants and their families, from their homes, and forfeiture of all monies paid by plaintiffs which in many cases equals or exceeds the fair value of the property involved.

20. Malice is the gist of this action as to each and every one of the defendants named in this count. In committing the acts alleged in this count the defendants, and each of them, acted willfully and maliciously. Plaintiffs have no adequate legal remedy.

Prayers For Relief

WHEREFORE, plaintiffs pray that:

(1) The contracts executed by plaintiffs and the members of the class who plaintiffs represent be declared void and unenforceable, and that each of the defendants be ordered to return to plaintiffs or the members of the class (i) all of the moneys each defendant has received under the aforesaid instalment contracts, together with interest at the rate of 6% per year from the date of receipt of each payment, and (ii) all of the monies each plaintiff or class member has expended upon structural improvements to the property, plus 6% interest, (iii) less a fair, non-discriminatory rental for the property for the period it has been used and occupied by one of the plaintiffs or their tenants.

(2) In the alternative to (1), the unconscionable provisions of the contracts, including but not limited to those relating to the price and to forfeiture, be reformed or declared unenforceable.

(3) Each of the defendants be ordered to account to plaintiffs and the members of the class for all monies received by defendants under the aforesaid instalment contracts.

(4) Plaintiffs and the members of the class receive judgment against defendants, and each of them, jointly and severally, in the amount of the actual damages sustained by each of the plaintiffs and the members of the class.

(5) Each plaintiff and each member of the class receive judgment for $25,000 punitive damages against each defendant who participated in the transaction with the plaintiff or class member.

(6) As a necessary aid to its jurisdiction, the Court enter a temporary restraining order and a preliminary injunction, and upon the final determination of this action, a permanent injunction, restraining defendants and all persons acting in concert with them (i) from taking any action against plaintiffs or the members of the class, in or out of court, in any presently pending action or in any future action, to declare or order forfeitures under the aforesaid instalment contracts, to remove or to order the removal of plaintiffs or the members of the class or their tenants from the buildings which are the subject of those contracts, (ii) from obtaining money judgments under said contracts, (iii) from attempting to garnish or levy upon plaintiffs' assets, on judgments recovered on said contracts, or (iv) from seeking or obtaining any judicial or other relief against plaintiffs or any of them, or the Contract Buyers League, or its agents, or the members of the class under or with regard to said contracts.

(7) The Court adjudge that each and every defendant acted willfully and maliciously and that malice is the gist of this action.

(8) The Court order the revocation and forfeiture of all federal, state and municipal licenses held by any of the defendants by reason of their wrongful and malicious conduct as described herein.

(9) The Court enter judgment for plaintiffs and against defendants for plaintiffs' reasonable attorneys' fees and costs of this action.

(10) The Court grant plaintiffs and the members of the class such other and further relief as may be just and equitable . . . .

APPENDIX E

CONTRACT BUYERS LEAGUE, an unincorporated voluntary association, et al., Plaintiffs,

v.

F & F INVESTMENT et al., Defendants.
No. 69 C 15

United States District Court
Northern District of Illinois
May 21, 1969.

OPINION*

WILL, District Judge.

Plaintiffs, suing as a class, seek relief with respect to contracts for the sale of used residential property in the City of Chicago. Their complaint contains five counts. The first alleges violation of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982, 1983, 1985(3), and of the Thirteenth and Fourteenth Amendments of the Constitution of the United States. Counts two and three allege, respectively, violations of the federal antitrust laws and of the antitrust laws of the State of Illinois. Count four of the complaint alleges violation of the federal securities laws.

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* The portions of the Opinion not reproduced here relate to plaintiff's allegations of violations of federal and state antitrust laws, federal securities laws, unconscionability, fraud, usury, breach of implied warranties, and to the statute of limitations and the standing of the Contract Buyers League as a named plaintiff.

Count five alleges violation of the Illinois common law regarding fraud, usury and unconscionable contracts.

This Court has previously determined that under Rule 23 of the Federal Rules of Civil Procedure, plaintiffs can maintain this action as a class action; and the Court has defined the plaintiff class, subject to future revision and refinement, to be composed of negroes who, since January 1, 1952, have entered into installment contracts for the purchase of used residential real estate in the City of Chicago.[1] The determination that a class action is appropriate was based on the recognition that the common questions of law and fact "predominate" over the individual questions. The essence of this complaint is that violations of law resulted from defendants' concerted exploitation of a condition of *de facto* racial segregation existing in the City of Chicago. Thus, the Court found that common questions of law and fact "predominate" within the terms of Rule 23 because it is alleged that the illegal advantage secured under any one contract depended on, was complemented by, and resulted from a concert and pattern of discriminatory activity including other similar contracts.

The Motions to Dismiss

By way of motions to dismiss each and every count of the complaint, defendants have now challenged the sufficiency of the allegations.

Before proceeding with the required determination, it should be noted at the outset that when considering a motion to dismiss, a district court must consider all the allegations of fact contained in the complaint and it is uni-

[1] Contract Buyers League v. F. & F. Investment, 69 C 15 (N.D. Ill. March 29, 1969).

formly recognized that when a court is making this determination, the complaint must be liberally construed.[2]

Count I — The Civil Rights Act of 1866, and the Thirteenth and Fourteenth Amendments

The First count of the complaint relates essentially to the allegations, here taken as admitted for purposes of the motions to dismiss, that defendants exploited a system of *de facto* racial segregation that existed in the City of Chicago, and that by taking advantage of the scarcity of housing for negroes in the City of Chicago, defendants have secured unlawful advantage in the contracts executed by plaintiffs. As described in the complaint, the scheme of exploitation often included obtaining purchase money mortgages based on false and excessive appraisals of used residential property. The essence of the scheme is alleged to have been the purchase of residential properties from white homeowners and the resale, often in the nature of quick "turn-around" transactions, at greatly inflated prices to negro purchasers, who were disadvantaged by the system of *de facto* segregation and the resulting shortage of housing for negroes in Chicago. The terms of the con-

[2] In language characteristic of the determination of a motion to dismiss, the Seventh Circuit Court of Appeals has said, " * * * on a motion to dismiss, a complaint should be construed in the light most favorable to plaintiff with all doubts resolved in his favor; and in view of what is alleged, with all allegations well pleaded being takn as true, if it can reasonably be conceived that the plaintiff can make a case upon trial which would entitle him to some relief the complaint should not be dismissed." Jung v. K. & D. Mining Co., 260 F.2d 607, 608 (7th Cir. 1958).

See also, United States v. Howell, 318 F.2d 162, 166 (9th Cir. 1963); Thomas v. Atlantic Coast Line R. Co., 201 F.2d 167, 170 (5th Cir. 1953); Cool v. International Shoe Co., 142 F.2d 318, 320 (8th Cir. 1944).

tracts, especially the price, are alleged to represent unlawful profit gained through this pattern of exploitation.

The complaint also alleges in Count I a separate aspect of discriminatory activity. It alleges that some defendants amplified and fostered the *de facto* segregation on which the contracts depended. The complaint asserts that some of the defendants engaged in what is popularly known as "blockbusting," that some of the defendants stimulated and preyed on racial bigotry and fear by initiating and encouraging rumors that negroes were about to move into a given area, that all non-negroes would leave, and that the market values of properties would descend to "panic prices" with residence in the area becoming undesirable and unsafe for non-negroes. The complaint thus charges not only that defendants exploited the existing condition of *de facto* segregation, but that by prompting and encouraging a stampede of white sellers, some defendants extended and developed the underlying inequity of segregation that was the breeding ground for their discriminatory profit.

Section 1982 of the Civil Rights Act of 1866 provides that:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), the Supreme Court of the United States declared the constitutionality and determined the scope of Section 1982 Beginning its opinion with the sum and substance of its determination, the Court stated,

> We hold that § 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of

property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment. *Id.* at 413, 88 S.Ct. at 2189.

The manner of discrimination specifically involved in *Jones* was the refusal to sell a home to an individual solely on the ground of the individual's race. In the instant case, the discrimination alleged is the sale of used residential property to negroes at higher prices and on more burdensome terms than similar property is sold to whites. Defendants contend that this difference in fact is a difference in kind under the law, that the Supreme Court's conclusion as to the import of Section 1982 is therefore not applicable to this case.

But the language and logic of *Jones* and the constitutional application that the Supreme Court regarded as the source of the Civil Rights Act of 1866 must be equally applicable to the discrimination alleged in this case. The Court found that the legislative history of the 1866 Act demonstrated the Congressional intent to ensure that the former slaves could participate fully in a national economy. It was the Court's conclusion that the existence of a black market distinct from a white market was the *de facto* vestige of what the Congress in 1866 intended to abolish as a critical means of making the black man a free man. The conviction recognized was that the obliteration of the social system where one man was the slave of another required a fundamental matter that our country be undifferentiated as to the race of a man. The Court thus understood Section 1982 as implementing the Thirteenth Amendement "to assure that a dollar in the hands of a Negro will purchase the same thing, as a dollar in the hands of a white man." *Id.* at 443, 88 S.Ct. at 2205.

The Court did point out that § 1982 was limited to activity directly covered by the express terms of the Section.

The Court thus stated, "at the outset, it is important to make clear precisely what this case does *not* involve," and went on to say that § 1982 "does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling. * * * It does not refer explicitly to discrimination in financing arrangements or in the provision of brokerage services." *Id.* at 413, 88 S.Ct. at 2189. Of course, the alleged blockbusting and discriminatory lending in the instant case do not fall within the express terms of § 1982. However, the basic claim in this lawsuit clearly does. The basic activity is the purchase of property. Blockbusting and discriminatory lending are alleged to be additional activities, part and parcel of the alleged conspiracy, which extended the scope and impact of the allegedly discriminatory sale and purchase.

Defendants *in terrorem* point to what they suppose to be the incredible consequences of a holding that Section 1982 bars the sale of residential property to negroes at a higher price because of their race. Defendants contend that this holding would mean that "every non-white citizen has a cause of action maintainable in Federal Court to either rescind or reform each and every transaction involving a purchase or leasing of either *real* or *personal* property by the simple allegation that he was charged more than a white person *would have been* charged or that he received less favorable terms and conditions than would have been given to a white person."

For the purposes of a motion to dismiss, and considering that any such allegation would be subject, as any allegation, to the test of proof on trial, defendants are correct. Moreover, the converse is also true. Every white citizen may allege a cause of action on the ground that he was charged more or received less favorable terms than would have

been given to a black person. The Supreme Court noted that the defendant in *Jones* similarly pointed to "the revolutionary implications of so literal a reading of § 1982." *Id.* at 422, 88 S.Ct. at 2194. The Supreme Court responded by stating, "our examination of the relevant history, however, persuades us that Congress meant exactly what it said." *Id.* at 422, 88 S.Ct. at 2194.

What was true in *Jones* is true here also—that defendants call "revolutionary" what is simply a denial of their assumption that there is a necessary sanctity in the *status quo.* Defendants present the discredited claim that it is necessarily right for a businessman to secure profit wherever profit is available, arguing specifically with respect to this case that they did not create the system of *de facto* segregation which was the condition for the alleged discriminatory profit. But the law in the United States has grown to define certain economic bounds and ethical limits of business enterprise. Developed areas of the law such as are invoked under the fraud and antitrust counts of this complaint are characteristic examples. So we are hearing an old and obsolete lament. For it is now understood that under § 1982 as interpreted in *Jones* v. *Alfred H. Mayer Co.* there cannot in this country be markets or profits based on the color of a man's skin.

Defendants also suggest that this case cannot involve "actual" discrimination, but only "hypothetical" discrimination. Their notion is that because the complaint does not state that defendants ever made sales of similar property to whites as they sold to plaintiffs, the possibility of discrimination somehow disappears.

We first point out what should be obvious—that allegations are not "hypotheticals." The claim that defendants sold to negroes at a higher price than similar property

would be sold to whites will be subject to proof on trial. Second, and most important, defendants' position elaborated is that if property is sold to a negro above what can be demonstrated to be the usual market price, there can be no discrimination unless the same seller actually sells to whites at a lower price. It should be clear that in law this result would be obnoxious. In logic, it is ridiculous. It would mean that the 1866 Civil Rights Act, which was created to be an instrument for the abolition of discrimination, allows an injustice so long as it is visited exclusively on negroes.

In sum, then, there is no reason to distinguish a refusal to sell on the ground of race and a sale on discriminatory prices and terms. Count I of this complaint states a claim under Section 1982 of the Civil Rights Act of 1866 as understood in *Jones* v. *Alfred H. Mayer Co.*, and the motions to dismiss must be denied with respect to Count I of the complaint. Because the motion is thus denied, we need not reach the question of whether the complaint states a claim under the other grounds asserted in Count I. . . .

Motions of Various Banks to Dismiss and for Summary Judgment

Certain of the banks named as defendants in their capacity as trustees under land trust agreements have moved to dismiss or for summary judgment on the ground that they hold only legal title to the properties in question and have no authority to deal with the properties beyond their limited responsibilities as trustees. They describe their responsibilities under the agreements and the law of Illinois as comprehended by the duty to follow directions of beneficiaries and to perform certain ministerial responsibilities. They insist that they lack any power of management or control which could be the basis for par-

ticipation in the alleged conspiracy and pattern of discriminatory conduct. The complaint, however, alleges that these defendants actively participated together with the other defendants in the unlawful activity. At this early stage of the litigation, on the basis of the complaint, motions and affidavits before the Court, the allegation that the banks have participated is not so frivolous nor unlikely as to render it appropriate to grant the banks' motions. On the basis of the allegations, it is certain that in some circumstances at least, the banks would have had notice of the disparities in price, the appraisals and the "turn-around" nature of some purchases and sales. In other words, the allegations as directed against the movant banks have stated causes of action and raised material issues of fact which under Rules 12(b) (2), 12(b) (6) and Rule 56 of the Federal Rules require denial of the banks' motions.

Moreover, although the banks claim that they are not the real parties in interest and could not, therefore, participate in the unlawful activity alleged, the banks in many instances are the only identified sellers since they executed the contracts as sellers, and the buyers have no way to identify the real parties whom the banks assert have complete management and control over the trust properties. Until such disclosure is made, plaintiffs are relegated to the public record as it now stands in seeking vindication of any right or recovery of any loss. For the present, therefore, plaintiffs properly assert their claims against the banks even though the banks may subsequently demonstrate that they are only nominal parties in interest.

Finally, it is also right that the banks should remain parties at this stage of the litigation because their presence may well be required for the successful implementation of

any relief granted. While a trustee bank could generally be expected to cooperate in the implementation of any decree directed to the beneficiaries under a trust, the lack of identification of the real parties in interest creates possible complications which make it desirable to retain the banks at this time as named defendants. In any case, the presence of the trustee will indubitably facilitate the implementation of any decree because the trustee may be required to act as a prime mover in the resolution of the litigation with respect to a particular contract. . . .

APPENDIX F

CONFESSIONS OF A BLOCK-BUSTER

A CHICAGO REAL-ESTATE AGENT WHO MOVES NEGRO FAMILIES INTO ALL-WHITE BLOCKS REVEALS HOW HE REAPS ENORMOUS PROFITS FROM RACIAL PREJUDICE.

BY NORRIS VITCHEK AS TOLD TO ALFRED BALK

Not long ago in an all-white block on Chicago's West Side, a FOR SALE sign appeared in front of a modest frame bungalow. Immediately a wave of fear swept across the block. A Negro family already was living several blocks away. Not far beyond that was the western edge of Chicago's "Black Belt." Every year its border had been moving closer, enclosing blocks like this one along the way. Suppose the bungalow came into possession of a Negro? What would happen to the rest of the block?

All the residents were plainly worried. Among them were a widow who had been living alone and had no assets but her home, and the parents of four young children who feared what "change" might mean to the youngsters' safety. "Relax," said the bungalow owner. "I'm selling this through a white real-estate man. I won't even talk to a Negro."

Imagine their shock, then, when the FOR SALE sign came down and the new owners moved in—Negroes. And consider the impact of what happened next. Three more buildings, which were already owned by property speculators, "turned" immediately. Other Negro families arrived to look at homes in the block. Real-estate men, both white and Negro, swarmed in.

Almost overnight the family with four children sold out at a sizable loss. So did six other homeowners in quick succession. "We'll stay," a few owners said. "We're broad-minded." But the situation was out of their control. Finally the last of the whites left—whether or not they could afford to move. Like hundreds of others who have been similarly blitzed, they never really knew what had hit them.

I knew. I triggered the whole sequence of events by buying the bungalow and quickly selling it to a Negro. I am a block-buster. Another and perhaps slightly less odious name for my craft is real-estate speculator.

Cornering a Share of the Harvest

I specialize in locating blocks which I consider ripe for racial change. Then I "bust" them by buying properties from the white owners and selling them to Negroes—with the intent of breaking down the rest of the block for colored occupancy. Sometimes the groundwork—the initial block-busting—has already been done by some other speculator by the time I arrive on the scene. In that case all I have to do is to work on the remaining whites and reap my share of the harvest.

I make my money—quite a lot of it, incidentally—in three ways: (1) By beating down the prices I pay the white owners by stimulating their fear of what is to come; (2) by selling to the eager Negroes at inflated prices; and (3) by financing these purchases at what amounts to a very high rate of interest. I'll have more to say about these techniques later.

Block-busting is a relatively new business—only ten to fifteen years old actually—but already it is a crowded field. Block-busters also operate in Washington, D.C., Baltimore, Philadelphia, New York City, Boston, Cleveland, Detroit,

St. Louis and other cities and in some of their suburbs. Chicago alone has more than 100 of us. Because few Negroes can command the necessary financing to enter this occupation, most of us are white, as I am. Over the past ten years we have helped "change" an average of two to three blocks a week in Chicago. Even now, with the overall housing market rather quiet, we bust a new block in Chicago every four to eight days.

With the nation's Negro population exploding and continuing to concentrate in urban areas, the demand simply never lets up. More than half the citizenry of Washington, D. C., is Negro. Philadelphia is one fourth Negro. In Chicago the Negro population, now one fourth of our citizenry, has nearly doubled in the past ten years and probably will double again in the next thirty, rising to 1,700,000 persons, or half the city's present population. Even its suburbs, now mostly white, are expected to contain nearly 700,000 Negroes by 1990.

Average Citizens, Average Prejudicies

If you are an average white citizen, with average prejudices, you may regard all this as the ruin of metropolitan neighborhoods. I think of it merely as more business for what already is a growth industry. My attitude stems from the fact that few white neighborhoods welcome Negroes who can afford to buy there; yet the need for homes for Negroes keeps growing, I assist in the solution of this problem. My function, which might be called a service industry, is to drive the whites from a block whether or not they want to go, then move in Negroes.

You might think it would be difficult to bust a block, especially your block. It isn't really. In most blocks someone almost always is being transferred, wanting a larger or smaller home, or moving away for his health. If I offer

enough money, I can buy any building I want—if not directly, then through a front. It doesn't matter whether Negroes now live nearby. The shock effect of the block-busting, plus my ready financing, can cave in enough of the block to make my efforts successful.

But I prefer blocks near others where Negroes already live—especially old, middle-class blocks with a mixture of frame homes and walk-up apartments. Whites already there have been conditioned to insecurity by the inexorable march of the color line in their direction. This makes these blocks setups for the quick turnover, large volume and the large profits I like. The case of a South Side block I busted is typical.

Twenty-five years ago when most of the block's residents moved in and Chicago's population was only 8 percent Negro, none of the whites imagined they might be "endangered." All this racial business was somebody else's problem. Then one day reality began to dawn on them. All-white streets along which they drove to the Loop suddenly "turned." Fairly distant stores and theaters they had patronized, friend's homes they had visited, or churches they had attended were being swallowed.

"We'll organize," some residents said. "We'll keep the niggers out." But other speculators and I already were buying buildings in adjacent blocks and holding them until we thought the area was ready to be turned for maximum profit.

You can't appreciate the psychological effect of such a color-line march unless you have seen it. First, Negro students begin enrolling in neighborhood schools. Then, churches and businesses in the area quit fixing up facilities as they normally might. Parks which have been all white suddenly become all Negro. A homeowner applies to his

bank for a home-improvement loan and is turned down, "Too close to the color line," he is told.

Small businesses begin to close. New whites, if they move into the area at all, are apt to be of lower economic class than before, and they are tenants, not owners. Because lending institutions always blacklist an area for regular mortgages when change appears imminent, whites can't buy there if they want to.

So it went in my typical South Side block. But the residents still thought they were safe because everyone had agreed not to sell to Negroes. Hence they weren't too disturbed when a bluff, friendly accountant who was retiring and moving to Florida announced to neighbors that he was listing his three-flat building for sale. As weeks passed, however, and no buyer was found, their suspense grew, and the owner became desperate. "We're stuck," he told his wife. "We told everyone we wouldn't sell them out. But we have to."

Up to this point only a few Negro real-estate men rather tentatively had rung doorbells in the block. Now we speculators and brokers, both white and Negro, really went to work. One paid several Negroes with noisy cars to begin driving up and down the street a few times a day. He also paid a Negro mother who drew aid-to-dependent-children payments to walk the block regularly with her youngsters. Another arranged to have phone calls made in the block for such people as "Johnnie Mae." Sometimes calls would consist only of a whisper, a drunken laugh or a warning—such as, "They're coming!"

I didn't participate in these vicious tactics. Few large speculators do. If I operated so crudely, frankly I wouldn't have consented to write this report, even under the fictitious name in the by-line. I just use psychology.

I began my work in this case by sending a postcard to everyone in the block and others in adjacent blocks. The cards said, "I will pay cash for your building." That was all except for my phone number. The word "cash" was the key. It assured homeowners they could get out quickly and reminded them that their neighbors could too. Then a canvasser and I headed for the block to repeat the offer in person.

Best Price for First Building

My first stop was at the home of the retired accountant who owned the three-flat building. "How much are you asking for your building?" I asked him.

"Twenty-two thousand," he said.

"Well," I said, "you might get that if you wait. But you know what is happening in the neighborhood. If you want a quick cash deal, I'll give you $18,000." But, knowing that we speculators often pay proportionately more for the first building on a block to go, he would come down only $1000 in price. At that point I got a break. My canvasser, who had been talking with other owners, rang the doorbell and called me onto the porch to tell me something.

"His neighbor in the one-story brick just sold for $14,000," he told me.

"Sorry," I told the accountant. "Negroes will be moving in next door. Eighteen thousand is tops." His quick call to the neighbor confirmed my canvasser's report, and he accepted my offer on the spot.

The moment I make a deal, I always place a "Sold by" sign in front of the building. A few such signs—the gaudier, the better—show that events are moving. So does the ringing of doorbells. And with thirty other real-estate

men working a block, including regular dealers as well as speculators, those bells ring often.

Changing the rest of this block, as in most other blocks, was easy. After posting my signs, I merely sent a man down one side of the street and up the other punching doorbells.

When a delivery driver who had two young daughters in school said he "probably would leave for the good of the kids," but wanted to think about it, my man discussed the pros and cons in a friendly way. "If you take my quick deal," he concluded, "you'll have no worries about the kids. You can give them a nice yard and have them in a good suburban school next week." The man and his wife, obviously troubled, decided my canvasser was right. They sold at a $2000 loss.

To an elderly couple who hesitated, saying their home and neighborhood were the only ones they had known throughout their marriage and they would "stay around and see what our new neighbors are like," my man said. "I know what waiting has meant to people like you in worry and strain. Waiting never makes it easier. If you take my cash deal while I still can offer it, you can begin looking for a new retirement home tomorrow." They sold too.

First "Break" Can Bring Trouble

"No, thanks," several owners told my canvasser. "My own real-estate man is finding me a Negro buyer."

Some owners on every block consider this. If they can close a deal directly with a Negro, usually it is for a price close to the property's book value—thus benefiting both. But most whites are reluctant to bargain with a Negro over so large a sum. They know that, in the sixty to ninety days

before the closing date, he is more likely than a speculator to have to cancel the deal, despite having earnest money down. Many times although the owner has listed his property with a neighborhood agent, the real-estate man ends up by arranging a deal with me—with the seller not only accepting a depressed price but also having to pay a broker's commission.

And so day by day, week by week, month by month, the block collapse further, until the last white finally moves away.

Now admittedly, although somebody would perform this economic function if I did not, these dealings are not always pleasant. In the first place, the Negro able to buy property usually doesn't want trouble. Yet, being the first to "break" an all-white block, or even second or third, can and often does bring trouble.

For example, there was the case of a Negro salesman who had just been promoted to a supervisory position in his firm. He came to a speculator seeking an income property into which he could move his family. The speculator told him about a three-flat building he had just bought from whites. "The place we're renting is bad," the Negro said, "but we don't want any trouble. Has the block been busted?" The speculator owned another building there, but the block hadn't been busted, in the sense that Negroes already were living there. However, knowing the three-flat building would be a good investment for the Negro and that he should be able to cary it financially, the speculator told him, "It's OK."

In the first few days after the Negro moved in a bottle was thrown through his front window, his wife was insulted by several whites who lived in the block, and his two children were harassed on their way home from school.

Few Negroes or whites on Chicago's West Side have forgotten the riots involving thousands, three summers ago, after a speculator's sale of a building to Negroes on West Jackson Boulevard. Luckily only the building got hurt. And, fortunately, any incidents connected with the move-ins I handle are so minor in comparison to what Negroes already have experienced that they soon are forgotten.

"You've Sold Out Your Own Race"

Actually, block-busting probably is tougher on the whites than the Negroes. Nobody who has lived in a neighborhood for years, seen his children grow up there, remodeled his home exactly to his liking and become accustomed to nearby school, church and shopping facilities likes to be uprooted. This is particularly true if it happens so suddenly that he has no new neighborhood in mind, if he has to accept less living space and a higher-interest mortgage than he previously had and if he must sell his property at a loss. Several elderly persons have died because of the anguish and upheaval involved.

As a result of my business dealings, I have been cursed, called "nigger lover," "vulture," and "panic peddler," had doors slammed in my face and even been chased by an irate woman with a broom. "You're Communist and un-American!" one owner shouted at me. "You've sold out your own race!" others have yelled.

It is hard to forget, too, how even long-time neighbors and friends may become jealous, suspicious and antagonistic toward one another. After one middle-aged couple had built a suburban home and sold their former home to a speculator—and the speculator had "turned" it—several former neighbors hired a sound truck and drove to the couple's new home. They cruised the block, shouting, "Be

sure and meet your new neighbors, the Joneses. They sold out their old block to Negroes."

Once a block has been busted, some white owners simply stare, almost dumbfounded, as we draw up sale papers for them. Others break down and cry. Some say, "It's OK to show the place to Negroes before we move, but we don't want to be in the house to watch it when you do."

But no matter how emotional or awkward some situations may be, there is one compensation for it all—money. Some brokers or investors make a good return only on some deals. I make it on every deal in the three ways I mentioned earlier.

You may believe your home is worth $15,000, for example. If I bust your block, I will expect to buy it for $12,000 cash. The odds are that eventually you will sell for that price, if not to me, then to another speculator. If you and your white neighbors did not run, you probably would gain, rather than lose. More than four fifths of the white neighborhoods into which Negroes move hold their own or enjoy an increase in value, according to a five-year Fund for the Republic study of 10,000 transactions in Northern interracial neighborhoods. But the myth that "Negroes lower property values" persists—so whites run, and we block-busters clean up. Within a few days comes profit No. 2: I advertise and sell it to a Negro not for $15,000, but for $18,000. Financing the deal myself, I will accept $500 to $1500 down, with the remainder on contract. The easy-payment plan, I believe it is called—that is, $150 to $200 a month until the contract is fulfilled. When is that? This is profit No. 3, the big one. The contract is fulfilled when I have been paid principal and interest totaling $36,000.

These terms, I am told, force Negroes to overcrowd and overuse their buildings by renting out part of them, or to

skimp on maintenance, starting the neighborhood on the way to blight. (In most Negro neighborhoods in Chicago the population density is five times that of white areas.) The contract burden, I also am told, forces Negro mothers to work, despite the presence of youngsters at home, compels fathers to take two jobs and can lead to numerous other problems because of the financial strain and anxiety.

Even so, the number of Negro buyers who default on their payments is small. When it does happen in my own business, it is no loss to me, since I retain title to property until contracts are completed. I keep all the payments made until that time, evict the owners and either rent the building or resell it on about the same terms.

The Urban League of Chicago says we speculators make nearly $1,000,000 a month in our city in "abnormal" profit from Negroes who buy former white property on contract. This could be. I know that I make four times the profit I could for the same amount of effort in all-white real estate. If anybody who is well established in this business in Chicago doesn't earn $100,000 a year, he is loafing.

"A dirty business," you say? One that whites should fight?

White people in dozens of neighborhoods have tried fighting. They have pressured neighborhood banks and savings-and-loan associations to quit blacklisting their areas, resulting in token concessions. They have held block meetings to warn homeowners not to deal with those of us who advertise "Quick Cash Sales" in newspapers or the classified phone directory, have passed out leaflets listing speculators' names and have ripped up "Sold by" signs which were of larger size or were posted longer than city ordinance allows. They even won a fraud-and-misrepre-

sentation case against two block-busting brokers in Chicago, thanks to several blunders which no established operator would have made. Despite all such resistance, once a block has been busted, only rarely has its complete breakdown been halted. Too many forces are working for us speculators.

Ordaining the "Cave-in" Method

The Chicago Real Estate Board, an organization of the city's most prominent realtors, all but ordained the "cave-in" method in a policy laid down in 1917: "It is desired in the interest of all that each block shall be filled solidly (with Negroes) and that further expansion shall be confined to contiguous blocks. . . . "

The board, which is all white, no longer makes a copy of this statement available in its office, but the policy never has been rescinded or repudiated. None of the board's 1700 members violates it. No member, if he deals with Negroes at all, is likely to arrange for a sale to them in a white neighborhood that is not next to a "Negro block." Once a neighborhood begins changing, none will show homes there to whites.

Lending institutions' "no-Negro" or "no-integrated area" loan policies further perpetuate the trend, restricting Negroes to blocks we bust and forcing them to rely mainly on our contract sales for financing.

The City Council and Mayor Richard J. Daley, who, like his two immediate predecessors, comes from the all-white Bridgeport area of the city, also help. They regularly table every request for open-occupancy ordinances, which by opening up any neighborhood to Negroes who could afford to buy there would take the pressure off the few collapsing ones which are open.

The police put down violence promptly in any blocks which are busted in a "permissible" area. Yet, if a Negro is leapfrogged into a home beyond this zone, the protests somehow always get out of hand. In one case a policeman guarding a Negro's new home was seen showing several youths how to make a Molotov-cocktail incendiary bomb.

Some churches accept all this, often serving as rallying points for whites trying to "hold the line." One parish even has acted as an agent in the purchase of twenty-two buildings which normal turnover otherwise might have placed in the hands of speculators. When change begins, most churches then simply close up shop and sell most or all of their property.

Relentless March of the Color Line

Neighborhood improvement associations actually are usually "all-white" improvement associations. One, the Back of the Yards Neighborhood Council, has kept its area all while. But it began in the 1930's and has a unique authoritarian control extending through stores, banks, churches and industry in its stockyards neighborhood. Every other neighborhood, including one in which retail businessmen raised a war chest of $100,000, has "gone" when the color line reached it. And associations which opposed me before any breakthroughs end up happy to cooperate—if I will only "go slow" and not change blocks until association officials say they are "ready." I usually do this to keep their goodwill.

Newspapers, too, help prepare the way. Their only stories in this field usually concern the "panic" aspects. If they print stories about Negroes, it's only in connection with crime or welfare problems or population increases.

not with Negro church activity or business and educational success or other aspects of normal life in good Negro neighborhoods.

The Board of Education contributes by writing off a school once it begins to change racially, consigning it to overcrowding, double shifts and supervision by the least experienced and lowest-paid teachers—and by giving it the lowest proportion of counselors.

Then there are my financial sources, which are among the most reputable in the city. My credit is good in almost any bank or savings-and-loan association in town. It also is good with insurance companies, including several Negro firms. Merely by placing an ad in a daily newspaper, I can raise cash by selling my contract paper at a discount to some of the most reputable doctors, dentists, lawyers and other business and professional men in town.

With forces such as these on my side, why should I feel guilty? Am I really the basic cause of whites fleeing? Do I depress their property values and inflate prices for Negroes? When a Nego has been turned away from a bank, do I "trap" him into accepting a contract sale?

And what alternative can you provide for my function? Would you try to influence your bank or savings-and-loan association to begin lending to Negroes? Would you help remove the pressure on "busted" areas by welcoming a Negro family into your block? Do you even care that my business operates as it does? Whatever my faults and whatever the social stigma I endure, I don't believe I am hypocritical about all this. Can you honestly say the same?

APR 6 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. 72-~~1212~~ 1216

CHARLES BAKER, *et al.*,

Petitioners,

—against—

F & F INVESTMENT, *et al.*,

Respondents.

BRIEF OF RESPONDENT ALFRED BALK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

Table of Cases i

Reasons for Denial of the Petition:

1. No important question of federal law requiring this Court's attention is presented 2

2. The Court's denial of the discovery sought by petitioners was properly premised upon, and is also justifiable upon, non-constitutional grounds 3

3. The decision below is not in conflict with this Court's holding in *Branzburg* v. *Hayes*, 408 U.S. 655 (1972) 5

4. No gap has been created in civil as opposed to criminal cases on the question of compelling journalists to reveal their sources 7

Conclusion 8

Table of Cases

Alexander v. *United States*, 201 U.S. 117 (1906) 2

Branzburg v. *Hayes*, 408 U.S. 665 (1972) 5-6, 7

DeLong Corporation v. *Lucas*, 138 F. Supp. 805 (S.D. N.Y. 1956) 3

Garland v. *Torre*, 259 F.2d 545 (2d Cir. 1958) cert. den. 358 U.S. 910 (1958) 7

PAGE

National Utility Service v. *Wisconsin Centrifugal Foundry*, 44 F.R.D. 539 (E.D. Wisc. 1968) 3

Reed v. *Smith Barney & Co.*, 50 F.R.D. 128 (S.D.N.Y. 1970) 3

Republic Gear Company v. *Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967) 2

Shawmut Inc. v. *American Viscose Corp.*, 11 F.R.D. 562 (S.D.N.Y. 1951) 3

Titus v. *Rorick*, 167 F.2d 571 (6th Cir. 1948) 3

In the

Supreme Court of the United States

October Term, 1972

Docket No. 72-1212

Charles Baker, *et al.*,

Petitioners,

—against—

F & F Investment, *et al.*,

Respondents.

BRIEF OF RESPONDENT ALFRED BALK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Alfred Balk, who is a non-party witness in this action, respectfully submits that this Court should deny the petition by the plaintiffs for a writ of certiorari to the United States Court of Appeals for the Second Circuit for the following reasons:

1.

No important question of federal law requiring this Court's attention is presented.

The basic issues presented in these proceedings are: (a) whether a District Judge has the right in his discretion to control and administer discovery in a civil action pending before him; and (b) whether the District Judge at bar committed a clear abuse of that discretion.

The Court of Appeals correctly held, 470 F.2d 778, that: (a) the discovery order of the District Judge, 339 F. Supp. 942, was properly a discretionary order; and (b) the District Judge had not abused his discretion in entering the order. Indeed, were it not for the unusual circumstance that the order involved a deposition which was being conducted in a district other than the trial forum of the action (because Mr. Balk had moved to New York from Chicago), the order would not have been appealable at all. See e.g., *Republic Gear Company* v. *Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967). Cf. *Alexander* v. *United States*, 201 U.S. 117 (1906).

In their zeal for review, petitioners have incorrectly stated (Petition, p. 6) what the Courts below held. Both decisions were based upon and directed toward the particular facts of "this case," not a sweeping overview of the First Amendment or of journalists' rights under it or of any rigid distinction between discovery of the matters here involved in civil as opposed to criminal litigation.

2.

The Court's denial of the discovery sought by petitioners was properly premised upon, and is also justifiable upon, non-constitutional grounds.

A party's right to discovery and disclosure is not absolute, especially in the case of non-party witnesses such as Mr. Balk. In many cases not involving a claim of privilege or constitutional right of silence, where the particular facts have shown good cause, witnesses have been permitted to refuse to answer questions on the ground that the witness deemed the information personally confidential. See, e.g., *Titus* v. *Rorick,* 167 F.2d 571, 581 (6th Cir. 1948); *Reed* v. *Smith Barney & Co.,* 50 F.R.D. 128, 130 (S.D.N.Y. 1970); *National Utility Service* v. *Wisconsin Centrifugal Foundry,* 44 F.R.D. 539, 540 (E.D. Wisc. 1968); *De Long Corporation* v. *Lucas,* 138 F. Supp. 805, 809 (S.D.N.Y. 1956) (Kaufman, J.); *Shawmut Inc.* v. *American Viscose Corp.,* 11 F.R.D. 562, 566 (S.D.N.Y. 1951).

The District Judge, upon weighing all of the competing interests involved on the particular facts of "this case," reasonably concluded that the balance tipped decidedly in Mr. Balk's favor. The Court of Appeals agreed.

Indisputably Mr. Balk is not a party, and was not seeking to aid the respondents whose allegedly unlawful conduct he had uncovered and disclosed to the public in his article. Rather Mr. Balk had voluntarily testified at length in support of petitioners' case. Mr. Balk might possibly be sued for indemnity if, after revealing his source, the source were held liable, since Mr. Balk had contracted in writing not to reveal the source as a condition precedent of obtaining the article.

To subject Mr. Balk to potential liability would present an inexplicable anomaly of justice: indisputably Mr. Balk did not participate in or assist in the alleged wrongs and obtained no financial benefit or gain from them; rather he had exposed that wrongdoing so as to pave the way for public and private action, such as this very litigation, to end blockbusting.

Petitioners failed to make any showing (and indeed did not even attempt to show) that the information sought could not be obtained by them elsewhere. The alleged proceedings detailed at p. 4 of the Petition are not part of the Record below, were never mentioned below and indeed appear to be contradicted by the record and findings below. There was no claim or showing in either of the Courts below of any effort to ascertain the same information sought from Mr. Balk from any other source. There is still no claim that any of the possible "leads" referred to by the District Judge were explored by petitioners. Petitioners still have made no showing of ever having asked any of the party defendants in pretrial discovery whether he was Mr. Balk's source.

Likewise, the information sought from Mr. Balk does not "go to the heart" of petitioner's case, but rather deals with, at most, the identity of only one of a large number of defendants and none of the ultimate issues in the case. Significantly, Mr. Balk has never seen a list of the defendants in this action and, thus, does not even know if the source is one of them.

3.

The decision below is not in conflict with this Court's holding in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).

The decision of the Court of Appeals did not challenge the holding in *Branzburg* v. *Hayes;* both Courts below merely distinguished the *Branzburg (Caldwell)* decisions on the facts presented. The Court of Appeals at bar did not create a "journalist's privilege"; rather it specifically noted that this Court in *Branzburg* had ruled that "federal law does not recognize an absolute or conditional journalist's testimonial 'privilege' " (see p. 781 of 470 F.2d). Its statements regarding the issues presented in *Branzburg* are entirely consistent with this Court's opinion there, which stated (at p. 682 of 408 U.S.) that "[t]he sole issue before us is the obligation of reporters to respond to grand jury subpoenas . . . "

Likewise, there is no "conflict among the Circuits" or other conflict of the law involved at bar to warrant the attention of this Court. This Court itself recognized in *Branzburg* that there might be cases where disclosure of a journalist's source might not be appropriate. Mr. Justice White expressly stated that (at p. 691 of 408 U.S.):

> "[our] conclusion itself . . . does [not] threaten the vast bulk of confidential relationships between reporters and their sources. Grand juries address themselves to the issue of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas.

> Nothing before us indicates that a large number or percentage of *all* confidential news sources fall into either category and would in any way be deterred by our holding . . . " (Emphasis the Court's).

And Mr. Justice Powell, in his concurrence in *Branzburg*, also emphasized (at pp. 709-10 of 408 U.S.):

> "I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen . . . are without constitutional rights with respect to the gathering of news or in safeguarding their sources . . . *Indeed, if the newsman* is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he *has* some other *reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered.*" (Emphasis supplied.)

The decisions below comport with both of these statements. They do not, as petitioners allege (Petition, p. 7), "create an absolute journalist's privilege in civil cases," nor do they purport to. Rather, they merely ruled that, on the facts presented, the demanded disclosure was not shown to be warranted. Thus, the Court of Appeals specifically and consistently referred in its opinion to "this case" and ruled on the basis of the facts presented in "this case."

4.

No gap has been created in civil as opposed to criminal cases on the question of compelling journalists to reveal their sources.

In *Garland* v. *Torre*, 259 F.2d 545 (2d Cir. 1958) (opinion by Mr. Justice Stewart) cert. den. 358 U.S. 910 (1958), on the basis of the facts there presented, the same United States Court of Appeals for the Second Circuit did order a newswoman in a civil case to reveal her allegedly confidential source for portions of an article she had written. Although *Garland* was cited, apparently with approval, in this Court's opinion in *Branzburg* (see p. 686 of 408 U.S.) and was discussed at length in both opinions below (see pp. 783-84 of 470 F.2d and pp. 943-45 of 339 F. Supp.), petitioners at bar fail to cite it in their petition to this Court.

The Courts below properly distinguished *Garland* on its facts; they did not seek to overrule *Garland*. Both cases (*Garland* and the instant case) thus stand on the books in support of and as proof of the principle that each civil case will be decided on the basis of its own particular facts—as is true with regard to discovery rulings having nothing to do with alleged "privileges." In short, the Court of Appeals did not purport to and did not actually establish "an absolute journalist's privilege in civil cases," as petitioners mistakenly argue (Petition, p. 7).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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